JD-24-06
Buena, NJ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

COMAR, INC.

and

4-CA-28570 and
4-CA-33903

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO f/k/a AMERICAN FLINT GLASS WORKERS UNION OF NORTH AMERICA, AFL-CIO

Elana R. Hollo, Esq.
for the General Counsel.

Joel E. Cohen, Esq., and
Kimberly B. Nerenberg, Esq.
(McDermott, Will & Emery LLP)
New York, New York,
for the Respondent.

James R. LaVaute, Esq.
(Blitman & King)
Syracuse, New Jersey.

DECISION

Statement of the Case

PAUL BOGAS, Administrative Law Judge. This proceeding consolidates a compliance specification with a complaint alleging additional unfair labor practices. On September 27, 1999, Comar, Inc. (the Respondent or Comar), relocated the historically recognized bargaining unit from its facility in Vineland, New Jersey, to the Respondent's non-union facility in Buena, New Jersey, approximately 10 miles away. Upon relocating the unit, the Respondent refused to recognize the unit's long-time bargaining representative – the American Flint Glass Workers Union of North America, AFL-CIO[1] – and reduced the unit employees' wages and benefits.

[1] Subsequent to the relocation, the bargaining representative affiliated or merged with another entity and at the time of the hearing was known as the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO. In this decision, I refer to both this entity, and its prior manifestation, as "the Union."

The Union filed a charge, a complaint was issued, and on August 2, 2001, after a hearing, Administrative Law Judge William G. Kocol issued a decision finding the Respondent guilty of multiple violations of Section (a)(5) and (1) of the Act. On July 31, 2003, the National Labor Relations Board affirmed Judge Kocol's rulings, findings and conclusions, 339 NLRB 903 (2003). The Respondent filed a petition for review with the U.S. Court of Appeals for the D.C. Circuit, but on May 19, 2004, the Court denied that petition and enforced the Board's Order in its entirety. 111 Fed.Appx. 1 (2004).

On April 25, 2005, the Regional Director for Region Four of the National Labor Relations Board issued a compliance specification stating the amount of backpay that the Region had concluded the Respondent owed as of December 31, 2004, and which also reiterated the Respondent's obligations, set forth in the enforced Board Order, to bargain with the Union, engage in effects bargaining, and provide requested information. The Region issued amendments to the compliance specification on June 15 and September 27, 2005. The Respondent filed answers, and various amended answers on May 16, June 28, July 5, October 11, October 26, and October 31, 2005. The Respondent orally amended its answer further at the start of the hearing.[2] In its amended answer, the Respondent disputes the amount of backpay set forth in the specification and also argues that it is not required to comply with the paragraphs reiterating the Respondent's obligation, under the enforced order, to recognize and bargain with the Union.

Consolidated with the proceeding regarding the compliance specification, is one pursuant to a complaint in which the Regional Director alleges the Respondent committed unfair labor practices subsequent to the hearing before Judge Kocol. The Union filed the charge on May 20, 2005, and amended the charge on July 19, 2005, and the Region issued the complaint on August 24, 2005. The complaint alleges that the Respondent violated section 8(a)(5)and(1) by refusing to provide requested information about non-unit employees and by delaying the provision of requested information regarding unit employees. The Respondent filed its answer to the complaint on September 6, 2005, in which it denies that it has violated the Act as alleged.

A consolidated hearing on the compliance specification and the unfair labor practices complaint was held before me in Philadelphia, Pennsylvania, on November 2, 3, and 4, 2005. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following findings of fact and conclusions of law.

[2] At my direction, the General Counsel filed a master consolidated compliance specification that incorporates the various amendments, and the Respondent filed a master consolidated answer that incorporates all of the amendments to the answer, including those made orally at the start of the hearing. The master consolidated compliance specification was received at trial as Administrative Law Judge's Exhibit (ALJ Exh.) 1. The Respondent's master consolidated answer was submitted after the close of the hearing, and is hereby received as ALJ Exh. 2.

Findings of Fact[3]

I. Jurisdiction

The Respondent, a corporation, manufactures packaging products and medical device components for pharmaceutical, health care and personal care customers at its facility in Buena, New Jersey, where it annually sells and ships goods valued in excess of $50,000 directly to points outside the State of New Jersey. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Background

Prior to September 27, 1999, a bargaining unit of approximately 50 employees existed at the Respondent's applicator division in Vineland. The Union represented employees at the Vineland applicator division for over 40 years, beginning in 1955. The primary work of the Vineland applicator division was assembling droppers that are used to dispense liquid medications. The Respondent's droppers come in a wide variety of sizes and styles, but generally consist of three components – a pipette (small glass or plastic tube), a bulb that can be squeezed to extract liquid, and a cap/closure. The applicator division also produced at least two other items: a "combo stopper," which is a cap with a removable rubber stopper in it; and, a "bellows bulb" which is a cap with a specialty bulb.

On September 27, 1999, the Respondent relocated the applicator division from Vineland to another Comar facility about 10 miles away in Buena, New Jersey. The Buena facility has a number of departments, one of which, the finishing department, was assembling droppers at the Buena location before the Vineland applicator division was moved there.[4] Although both the Vineland applicator division and the Buena finishing department assembled droppers prior to the relocation, there were differences in the methods of production and capabilities at the two facilities. The Vineland applicator division assembled droppers using two types of machines. One type, known as a "rotary machine," can be used to assemble about 40 droppers per minute and requires an employee to manually insert the pipette into each assembly. There were 16 of these machines at the Vineland facility. The other type was known as an "auto dropper assembly machine" or "ADAM."[5] An ADAM is a higher production machine than the rotary machine, and it assembles all three dropper components, including the pipette, automatically. The record indicates that there were approximately 3 ADAMs in operation at the Vineland facility before the relocation. Unit members at the Vineland location also assembled some droppers manually at hand assembly benches. Employees who assembled droppers at Vineland were responsible for visually inspecting the quality of the product.

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[3] The General Counsel appended two motions to its post-hearing brief: 1) a motion to correct the transcript, and 2) a motion to correct the court reporter's misdesignation of several of Respondent exhibits as General Counsel exhibits. Both of these motions are granted. I have directed the court reporter to correct the exhibit designations.

[4] Prior to the relocation, the Vineland applicator division had fewer employees than the Buena finishing department. The record does not establish, however, what portion of the Buena finishing department employees were engaged in the same type of work as the Vineland unit employees prior to the relocation.

[5] Particular ADAMs are also sometimes referred to in the record as "West Machines" or "Bent Assembling Machines" ("BAM"). In this decision, all of these machines will be referred to generically as ADAMs.

At the Buena facility, on the other hand, droppers were assembled prior to September 27, 1999, using what the Respondent calls "high speed machines."[6] The high speed machines can assemble up to 300 droppers per minute and have computerized quality inspection mechanisms that eliminate the need for visual inspections by operators. While they are faster than the rotary machines and ADAMS, the high speed machines also have certain limitations. Most notably, the high speed machines are not practical for use on small production runs because of the effort that is required to changeover those machines from one set of dropper specifications to another. It is easier to make such adjustments to the types of machines that were used at the Vineland facility. In addition, the high-speed machines cannot be used to assemble droppers with glass pipettes due to the likelihood of breakage, whereas the rotary machines and ADAMs are used to assemble both glass and plastic droppers. There was testimony that glass droppers account for 10 to 15 percent of the Respondent's dropper business.

When the Respondent relocated the Vineland applicator division to Buena in September 1999, it offered almost all of the unit employees at the Vineland operation positions in the Buena finishing department. However, the wages and other terms that the Respondent offered to the relocating unit employees were substantially less advantageous to those employees than what they had been receiving pursuant to the collective bargaining agreement at the Vineland facility. Of the 47 unit members who were offered positions at the Buena facility, 23 accepted them.[7] In addition to moving the unit employees, the Respondent also moved equipment those employees had been working on at the Vineland facility. The Vineland equipment that the Respondent transferred to Buena included: 12 to 14 rotary machines, 3 ADAMs, 3 cap-punching machines that prepare caps for dropper assemblies, a re-knobbing machine that shortens pipettes, a machine that assembles the bellows bulbs, a shrink wrapper, a machine that assembles combo stoppers, the benches used for hand assembly, and stamping machines that decorate various components. The Respondent placed the transferred rotary machines and ADAMs in the manufacturing building at the Buena facility. This was a different part of the facility than the finishing building, where the high-speed machines already being used at the Buena location to assemble droppers were situated.

After the relocation to Buena, the transferred Vineland employees continued to perform the same work on the same equipment, under essentially the same supervision as they had at Vineland. They assembled, stamped, and wrapped the same products as before. As was the case before the relocation, the Respondent continued to assign the unit employees the short run projects that were more efficiently produced on the rotary machines and ADAMs than on the high speed machines operated by the non-unit employees in the finishing building. The unit employees had little daily interaction with non-unit employees. The Respondent did not show that the relocation resulted in an appreciable increase in the degree of integration of the work of the former Vineland employees with that of the Buena employees. Indeed, the Respondent had no plans to fully integrate the unit employees into the operation at Buena.

Immediately upon relocating the unit employees to Buena, the Respondent refused to recognize their Union, and ceased applying the terms of their collective bargaining agreement.[8]

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[6] After September 1999, the Respondent continued using high speed machines to assemble droppers at the Buena facility, but also began using other types of machines that had been moved there from the Vineland facility.

[7] The unit employees who did not transfer to the Buena facility ceased performing work for the Respondent as of the September 1999 relocation.

[8] The collective bargaining agreement stated an expiration date of September 30, 1999, but

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The Respondent stopped paying the former Vineland employees the wages they had been receiving at Vineland, and began paying them lower wages equivalent to those received by the non-unit employees at Buena. The Respondent also brought the terms and conditions of the unit employees into conformity with the mostly lesser terms and conditions of the non-unit employees by: eliminating one of the unit employees' holidays; eliminating the unit employees' personal day benefit; eliminating the unit employees' sick pay; reducing the unit employees' bereavement leave benefit; increasing the unit employees' vacation time; eliminating the unit employees' coverage under a Union pension plan; eliminating the unit employees' discrete seniority list and merging their seniority list with that of the finishing department employees at Buena; and eliminating the unit employees' separate 401(k) retirement plan and placing them in the same 401(k) as the non-unit employees. Under the Vineland contract, the unit employees enjoyed job tenure protections and preferences in the case of reductions in force or other reductions in personnel.[9] When the unit employees began work at Buena, however, the Respondent required them all to sign forms acknowledging that they were now "at will" employees. Prior to the relocation, the unit employees were not subject to an evaluation program, but at Buena the unit employees were covered by the same evaluation system as the non-unit employees. The Respondent made all of these changes unilaterally and without the consent of the Union.

III. The Board's Decision and Order

A hearing was held before Judge Kocol on May 21 and 22, 2001. On August 2, 2001, he issued a decision that was subsequently affirmed by the Board in the decision and order that gives rise to the compliance specification in this case. The judge found that the unit recognized at Vineland continued to be appropriate for bargaining after the relocation, and had not been accreted into the Buena finishing department. He concluded that the "Respondent essentially relocated the unit intact while reducing employee wages and benefits and ridding itself of the Union." The judge rejected the Respondent's claim that the company had "a well-defined plan or timetable established for achieving a functional integration of operations." To the contrary, the judge found, at the time of trial "the unit employees still worked in isolation, performing the same work on the same equipment as they had at Vineland." Moreover, the Respondent itself had acknowledged the separate identity of the relocated applicator division, informing employees that the operation would be moved to Buena "like a beehive" and reassuring customers that nothing about the operation was changing except the physical location. The judge stated that although the Respondent had made some changes "detracting from the distinctiveness of the unit," the Respondent could not benefit from those changes that it had made unlawfully.

The judge modified the unit definition because the existing definition described the unit as being located at the Vineland facility. He set forth the following modified unit description:

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also provided that it would remain in full force and effect after that date while negotiations for a new contract continued. Joint Exhibit (J. Exh.) 1 at Page 35 (Collective Bargaining Agreement, Article XXVII). Since September 30, 1999, the Respondent has refused to recognize the Union or engage in negotiations for a new contract.

[9] For example, Article XIV , Section 1, of the contract states that during a reduction-in-force the more senior employees will be retained if other factors are substantially equal. Section 5 of that article states that when personnel is decreased "due to changes in methods of operations or business conditions, employees with the greatest length of service shall be given preference." Article XIV, Section 6 states that during temporary lay-offs, employee requests for other jobs will be granted based on seniority, subject to certain requirements.

> All hourly paid production workers who are performing the work that was formerly done as part of the Applicator Division of Comar, Inc. at its facility then located in Vineland, New Jersey, except plant executives, salesmen, office employees, janitors, watchmen and foremen, as excluded by the provisions of the Labor Management Relations Act of 1947 as amended.

The judge stated that this new unit description would continue to be appropriate "until the parties themselves agree to modify the unit description."

The judge went on to find that the Respondent had violated its bargaining obligations under Section 8(a)(5) and (1) by: failing to recognize the Union; changing the terms and conditions of employment covered by the collective bargaining agreement without obtaining the Union's consent; unilaterally changing other terms and conditions of employment without providing the Union with notice and an opportunity to bargain; failing to meet its obligation to bargain in good faith for a new collective-bargaining agreement; and conditioning continued employment of unit employees on their acceptance of wages and benefits that were lower than those reached through collective bargaining (thereby, effectively discharging 24 unit employees who refused to accept employment under the unlawfully implemented terms). In addition, the judge found that the Respondent violated its obligations under Section 8(a)(5) and (1) by refusing to provide the Union with information concerning: the locations where unit employees and the equipment used by those employees would be placed at the Buena facility; the identities of the employees who were assigned to operate that equipment; the supervisors of the unit employees; and the terms and conditions of unit employees at Buena.

The judge also held that the Respondent failed to meet its obligation to bargain with the Union concerning the effects of the relocation of unit work from Vineland to Buena. That obligation, he observed, includes the duty to bargain over the terms and conditions of employment under which the unit employees are initially to be employed at the new location. Although the Respondent had offered to bargain over the effects of the relocation, it had failed to meet its obligation in two respects. First, the Respondent had refused to supply the Union with information relevant to bargaining over the effects of the relocation. Second, the Respondent had unlawfully imposed working conditions on the unit employees at Buena and had not rescinded those changes. Until that unlawful conduct was rectified, the judge concluded, good-faith bargaining over the effects of the relocation was precluded and "the Union was justified in suspending [effects] bargaining."

In his recommended order, the judge required the Respondent to, inter alia: cease changing the terms and conditions of employment of unit employees covered in the collective bargaining agreement without obtaining the Union's consent; cease changing other terms and conditions of employment of unit employees without providing the Union with notice and an opportunity to bargain; recognize the Union as the representative of the unit employees; bargain in good faith with the Union for a new collective bargaining agreement; bargain in good faith with the Union concerning the effects on unit employees of the relocation of unit work to the Buena facility; rescind the unlawful changes made to unit employees' terms and conditions of employment; offer the 24 discharged unit employees reinstatement to their former jobs or, if those jobs no longer existed, to substantially equivalent positions; make the unit employees whole for any loss of earnings or benefits they suffered as a result of the unlawful changes and discrimination against them; provide the unlawfully withheld information; and post a notice. Despite the finding that the Respondent had failed to bargain in good faith regarding the effects

of the relocation, the judge rejected the General Counsel's request for a blanket *Transmarine*[10] remedy. He concluded that such a remedy would constitute a windfall for unit employees who were already receiving make-whole relief under the other aspects of the order. Instead, the judge ordered the *Transmarine* remedy only for "those unit employees, if any, who would not have accepted the transfer to Buena for reasons unrelated to the unlawful conditions of employment," or would not be reinstated because of the lack of a sufficient number of positions or substantially equivalent positions. His recommended order provided that an employee's net interim earnings would be deducted from any *Transmarine* award.

The Respondent filed exceptions to the judge's decision, and the General Counsel and Charging Party filed cross-exceptions. On July 31, 2003, the Board issued a decision affirming Judge Kocol's rulings, findings and conclusions. However, the Board modified the recommended remedy by extending the *Transmarine* remedy to all unit employees, including those already being provided with make-whole relief. In place of the paragraph in the judge's recommended order concerning the *Transmarine* remedy, the Board substituted a new paragraph that made the remedy available to all unit employees, and deleted the reference to a deduction for interim earnings. The new paragraph stated that it was the Respondent's obligation to:

> (j) Pay to the unit employees their normal wages when in the Respondent's employ from 5 days after the date of this decision until the occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the relocation of the unit employees from Vineland to Buena, New Jersey; (2) the date a bona fide impasse in bargaining occurs; (3) the failure of the Union to request bargaining within 5 business days after receipt of this decision, or to commence negotiations within 5 business days after receipt of the Respondent's notice of its desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith; but in no event shall the sum paid to any employee exceed the amount that he or she would have earned as wages from the date of the relocation of the unit employees to the time he or she secured equivalent employment; provided, however, that in no event shall this sum be less than these employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ at Vineland, with interest.

In a footnote to its decision, the Board rejected the Respondent's motion to reopen the record, but noted that during compliance proceedings a party was free to introduce "evidence of changes in its operations that occurred after the hearing, to the extent that such changes might affect the remedy."

The Respondent filed a petition for review of the Board's order with the United States Court of Appeals for the District of Columbia Circuit. On May 19, 2004, the Court of Appeals rejected the Respondent's petition and granted enforcement of the Board's order in its entirety.

IV. Union's Demands for Bargaining

On August 9, 2001, seven days after Judge Kocol issued his decision, the Union demanded, in writing, that the Respondent "recognize and bargain with the Union as the

[10] *Transmarine Navigation Corp.*, 170 NLRB 389 (1968).

representative of the bargaining unit, rescind its unlawful unilateral changes in terms and conditions of employment, and engage in effects bargaining." The Union made another written demand for bargaining on August 5, 2003, after receiving the Board's July 31 decision. In that letter the Union requested that the Respondent "engage in good faith bargaining, and that the Employer otherwise comply with the requirements of the Board's Order."

After the Court of Appeals May 19, 2004, judgment enforcing the Board's order in its entirety, the Respondent still refused to recognize the Union. The Respondent, in a July 30, 2004, letter to the Union, stated that "the Union does not represent any Comar employees." On August 18, 2004, subsequent to the Court of Appeals judgment, the Union again demanded that the Respondent engage in bargaining. The Union stated that, pursuant to Court of Appeals judgment, the Respondent should: recognize and bargain with the Union; bargain in good faith concerning the effect on unit employees of the relocation of unit work from Vineland to Buena; and rescind the unlawful changes that the Respondent made to unit employees terms and conditions of employment.

Despite the Board's decision and the Court of Appeals judgment, the Respondent: has continued to refuse to recognize the Union as the bargaining representative of the unit employees; has not bargained with the Union for a new collective bargaining agreement; has not bargained in good faith regarding the effects of the relocation; has not rescinded the unlawful unilateral changes covered by the Board's decision and order; has not provided any backpay at all to unit employees under any section of the enforced Board Order; has not made valid reinstatement offers to any of the unit employees;[11] and has not posted a notice.

V. Changes that Respondent Implemented to its Finishing Department Operations Subsequent to May 2001 Hearing

In this compliance proceeding, the Respondent argues that it is excused from many of the most important elements of the Board's enforced order because changes that the company made to its operations after the May 21-22, 2001 hearing eliminated the bargaining unit approximately 4 months later on September 30, 2001. The record shows that operations at the Respondent's finishing department were not static either before or after May 22, 2001. The Respondent introduced evidence at the compliance hearing which showed that the Respondent was engaged in an ongoing effort to reduce costs and improve quality by replacing more labor-intensive means of production with faster, more highly automated, processes. Most notably, the Respondent was reducing reliance on the labor-intensive rotary machines to assemble droppers and was shifting that work to the ADAMs and high-speed machines. As part of the relocation of the Vineland applicator operation, the Respondent initially moved 12 to 14 rotary machines to Buena. Over the next approximately 6 years, all but two of those machines were eliminated. At the time of the May 2001 hearing, the number of rotary machines in operation at the Buena facility had dropped to 11. In July 2002, the Respondent reduced the number of rotary machines in operation to 9-10 machines; in October 2002 it reduced the number to 8 machines; in December 2002 to 6-7 machines; in January 2004 to 5 machines; in October 2004 to 3 machines; and as of the time of the November 2005 hearing there were 2 rotary machines still in operation.[12] As one would expect, the cumulative number of hours that the group of

[11] On August 29, 2003 (prior to the Court of Appeals judgment), the Respondent sent letters to the discharged employees offering them positions at the Buena facility. For reasons discussed elsewhere in this decision, I conclude that those letters did not constitute valid offers of reinstatement.

[12] This information is contained in supporting documents included as part of Respondent's

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rotary machines was in operation also declined. As of the May 2001 hearing, the Respondent was operating its rotary machines for a cumulative total of approximately 2000 hours per month. In September 2001, and some other months at the end of that year, the total of numbers hours of operation of the rotary machines increased to over 2500 per month, but since that time the evidence shows a general decline. The number of employees also has declined. During the period from 2001 to 2005, the number of hourly employees at the Buena facility has decreased from 203 to 164, and within that facility's finishing department the number of hourly employees has decreased from 90 to 65.

As the rotary machines were eliminated, former Vineland facility employees were not terminated or laid-off, but rather were given other assignments at the Buena facility. Nearly all remained within the finishing department and began operating automatic machines, such as the ADAMs. The record indicates that, as of the time of the hearing, few of the positions of employees in the finishing department were specific to a particular machine. In most instances, the employee was assigned to work on particular equipment based on the needs of the Respondent. Employees in the finishing department were sometimes required to work in other areas of the Buena operation – for example, in the manufacturing department -- but apparently such outside assignments are very rarely given to employees who, like the former Vineland employees, were not previously employed in the Buena facility's manufacturing department.

During the period after the relocation, the Respondent also increased its reliance on ADAMs. Immediately after the relocation of the applicator division, there were 3 ADAMs in operation at Buena, all of which had been transferred from Vineland. Over the next six years, that number doubled. There were still 3 ADAMs at Buena as of the May 2001 hearing. By September 2004, the Respondent had increased the number of ADAMs at Buena to 5, and by the time of the compliance hearing, it had increased the number of ADAMs to 6. The ADAMs in operation at the time of the compliance hearing incorporated computerized quality assurance equipment that eliminated the need for visual inspections by the employees operating them. The record shows that for the years 2002 to 2005 the Respondent approved the following amounts for capital expenditures in the finishing department: $368,000 in 2002; $160,000 in 2003; $320,000 in 2004; and at least $355,000 in 2005

The Respondent moved some of the finishing department equipment operated by the unit employees to other locations within the Buena facility after the May 2001 hearing. At the time of the May 2001 hearing, most of the equipment that had been relocated from the Vineland facility was in the manufacturing building. In April 2002, however, the ADAMs machines in the manufacturing building were moved to the finishing building, close to the high speed machines. In 2002 or 2003, the Respondent also moved the bellows machine from the manufacturing building to the finishing building. That machine had been among the items relocated from the Vineland facility. Shortly before the November 2005 hearing, the Respondent also moved a cap punching machine from the manufacturing building to the finishing building. This cap punching machine had originally come to the Buena facility from the Vineland applicator division.

Subsequent to the May 2001 hearing, the Respondent also made a change in the way it staffed the ADAMs. In the past, both an operator and a set-up mechanic had assigned tasks on each ADAM. In 2003, the Respondent began to use a combined position called "set-up operator" for the ADAMs. The set-up operator would perform the tasks that the operators had

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Exhibit 12, which I hereby receive into evidence. The General Counsel and the Union originally lodged objections to the admission of this exhibit, but they withdrew those objections on the basis of compromises reached between the parties after the hearing.

previously done on the ADAMs, plus many of the changeover and basic troubleshooting work that the set-up mechanics had formerly performed. The unit members were free to apply, and be considered, for the set-up operator positions. Even after the Respondent began assigning set-up operators to ADAMs, it would, in some instances, assign regular operators to those machines. The change in the way ADAM-related tasks were distributed among employees did not change the tasks that had to be done in order to run the ADAMs. The Respondent also made changes to employees work hours and shifts, but did not notify the Union or give it an opportunity to bargain over those changes.

At the same time that the Respondent has been making the above-discussed changes in its finishing department operation, much has remained unchanged. As discussed above, the Board found that, despite the relocation and changes, the unit was appropriate for bargaining as of the May 2001 hearing. Since then, the Respondent has continued to make the same types of products. Virtually all of the droppers that the Respondent presently classifies as "standard" and "stock" either were manufactured at Vineland or could have been manufactured there.[13] Similarly, as was the case at Buena in May 2001, and as had been the case at Vineland, the Respondent continues to make most of its droppers on a "custom" basis. The Respondent also continues to produce combo stoppers and bellows bulbs. The customer base that the Respondent sells to from the Buena facility has remained essentially the same, as has the means by which it obtains supplies for production. The underlying decision finds that many of the supervisors from the Vineland applicator division became supervisors of the Buena finishing department after the relocation and that the unit employees continued working under essentially the same supervision. The Respondent did not establish that this continuity of supervision changed significantly after May 2001.[14]

In addition, the record shows that most of the types of equipment that unit employees operated at Vineland, and sometimes the very same equipment, were still in operation at Buena as of the time of the compliance hearing. As noted previously, the ADAM capacity that had come from the Vineland facility to the Buena facility, continued and was expanded upon at Buena. Vineland machines that are still in use at Buena also include a cap punching machine, the bellows machine, the shrink wrap machine, one or more of the benches used for hand assembly, a roll stamper, a combo stopper machine, and a re-knobbing machine. Two of the rotary machines transferred from the Vineland facility remain in operation, and both of those are still located in the manufacturing building in the area where they had been placed after being moved to the Buena facility. There were three high speed machines in operation at the Buena facility as of the time of the May 2001 hearing, and the record does not show that that number has ever changed. Indeed, as of September 2004 there were still three high speed machines in operation.

VI. Potential for Bargaining Over Changes in Operations

The Respondent did not give the Union prior notice or an opportunity to bargain before making any of the post-May 22, 2001, changes through which it now claims to have brought about the elimination of the unit. The Respondent contends, inter alia, that it had no obligation to bargain because those changes were not susceptible to collective bargaining. To support

[13] The only exception appears to be a few products made with child-resistant closures.

[14] The Respondent presented some general testimony about the current supervisory structure at the Buena facility finishing department, but did not show that this was a significant departure from the supervision that Judge Kocol discussed in his decision finding that the unit continued to exist at the Buena facility.

that contention, the Respondent relied on the testimony of Gregory Bianco, who was plant manager and operations manager of the Buena facility for approximately 5 years starting in July 2000 and who became the Respondent's program manager in April 2005. Bianco testified that nothing the former Vineland employees or their representatives could have offered in bargaining would have altered the decision to make the changes in equipment, assignments, and location of equipment and unit employees discussed above. For the reasons discussed below, I do not credit that testimony.

First, Bianco conceded that he was not one of the officials who decided to make the capital expenditures for the new machines and equipment upgrades. Bianco made annual recommendations for such changes, but the record shows that senior management frequently rejected many, and in some cases most, of those recommendations. Bianco did not claim to have been party to the deliberations that led senior management to purchase any of the new machines or equipment upgrades that Bianco had recommended, and none of those senior management officials testified in the compliance hearing.[15]

Second, Bianco's statement that no proposal by the Union could have altered the Respondent's decisions is speculation, and, it appears, speculation largely unmoored in objective fact. Bianco himself cited the desire to cut labor costs as a primary motivation for the changes at-issue here, and decisions in which labor costs are a factor are particularly susceptible to bargaining. Bianco did not claim to know what proposals the Union would have made regarding the changes, or what alternative solutions the give-and-take of bargaining might have generated. He did not even claim to have calculated the labor cost savings that would have resulted from specific alternative proposals that he suspected might be made and/or agreed to by the Union. Given Bianco's acknowledgment that labor cost savings were a major motivation for the changes, his conclusory claim that he somehow knew in advance that no alternative the Union might have offered could have alleviated the need for those changes is unworthy of credence. Moreover, the record suggests that Bianco had a bias in favor of viewing bargaining as futile. For example, he testified on direct examination that the Respondent would have moved the ADAMs to the finishing department even if the unit employees had offered to accept minimum wage in order to stop the change. However, on cross-examination Bianco conceded that he did not even know what the applicable minimum wage was and so, clearly, he could not have known what savings would have been realized from accepting such a proposal. For the above reasons, I do not credit Bianco's self-serving and conclusory pronouncements that there was no possibility that collective bargaining would have altered the course of the unilateral changes by which the Respondent now claims to have eliminated the unit.[16]

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[15] Indeed, while Bianco testified, in response to questions by the Respondent's counsel, that his recommendations were not influenced by a desire to eliminate the Union, the Respondent did not offer the testimony of senior management officials about whether they were influenced by anti-union considerations when they decided which of Bianco's recommendations to accept.

[16] To argue that it was permitted to the make the changes unilaterally, the Respondent also quotes a portion of a management rights provision in the collective bargaining agreement, Article XVIII, which states:

> The management of the Plant and the direction of the working force, including the right to hire, assign, suspend, transfer, promote, discharge or discipline for just cause, and to maintain discipline and efficiency of its employees and the right to relieve employees from duty because of lack of work or other legitimate reasons, the right to determine the extent to which the Plant shall be operated, and to change methods or processes or to use new equipment, the right to establish schedules of production, to

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VII. Letters Offering Employment to Discharged Employees

On August 29, 2003, the Respondent sent letters, by certified mail, to 22 individuals who the Board had found were effectively discharged.[17] In those letters, the Respondent stated that it was offering the individuals positions at the Buena facility. The letters all follow the same form, and state in relevant part:

> You are hereby offered a position as a [job title] at our Buena NJ facility at the same compensation you were earning at the time you were laid of (sic) in 1999. This offer is made unconditionally.
>
> If you accept the offer, please notify us in writing by September 15, 2003. If we do not hear from you by that time, we shall assume you are not accepting the offer.

The job title stated in 17 of the letters was "operator," in two letters it was "warehouse person," in two it was "mechanic," and in one it was "laborer."[18] Anthony Wiessner, one of the discharged unit members, started as a "warehouse attendant" at the Buena facility shortly after receiving a letter offering to employ him as a warehouse person. The evidence suggests that none of the other unlawfully discharged employees returned to work with the Respondent as a result of the letters.

VIII. Union's September 1, 2004, and January 18, 2005, Information Requests

After the Court of Appeals decision, the Union, in a September 1, 2004, letter to the Respondent, requested information that it stated was relevant to bargaining over the effects of the relocation of unit work from the Vineland facility to the Buena facility. That letter states in relevant part:

> introduce new or improved products, methods or facilities, and to extend, limit or curtain its operations, is vested exclusively in the Company.

The management rights clause also contains the following language, not mentioned by the Respondent:

> The above statement of Management functions shall not be deemed to exclude other functions not herein listed. In no case shall the exercise of the above prerogatives of Management be in derogation of terms and conditions of this Agreement.

[17] The Respondent did not send such letters to two of the individuals who the Board found were effectively discharged – James Smart and Michele Guilford. The parties agree that Smart is not entitled to reinstatement or backpay because he left the bargaining unit for a salaried position prior to the events involved in the underlying unfair labor practice proceeding. The General Counsel continues to seek relief for the estate of Michele Guilford, who died prior the Board's decision.

[18] The record indicates that these are not complete job titles. Operators are designated either as "A", "B," or "C" operators depending on their skill levels, and also receive a designation of "Glass" or "Plastics." Each mechanic is designated as either a "senior maintenance mechanic," a "finishing maintenance mechanic," a "maintenance mechanic," a "finishing set up mechanic," an "injection set up mechanic," a "blow molding set up mechanic," a "mold and die mechanic," a "finishing set up mechanic," a "set-up mechanic," a "lead mold mechanic." It does not appear that any current employee is designated simply as a "laborer."

Effects bargaining includes the terms and conditions of employment at the Buena location of relocated and relocating employees, including their physical work locations; and severance and other benefits for employees not relocating to Buena. In order to consider what proposals to make along the above lines, and to assist us in effects bargaining, we will need the following information in detail, for each hourly-paid employee at Buena:

1. Their name, specific job, physical job location, hourly wage rate, any hourly premiums, and all benefits including but not limited to retirement and health benefits and health insurance contribution (the company's and the employees');
2. Their immediate supervisor;
3. The equipment they work on;
4. Their shift hours;
5. Their average weekly hours of work for the last 12 months.

Additionally, please provide us with the terms of any plant closing or relocation benefit packages paid to employees of Comar since April 1999. Include the details as to the employees involved, what they received and the plant(s) involved, and any other terms of the package(s).

The next day, September 2, the Respondent replied by letter, stating that the Union's information request was "too broad in that it seeks information about Comar employees the Union has never represented." The Respondent did not object to providing information on the employees "who were represented by the Union and who transferred from Vineland to Buena," and stated that it hoped to forward such information to the Union "within two or three weeks." In the same letter the Respondent made a four-part request for information to the Union.

In a September 15, 2004, letter, the Union explained its position regarding information on non-unit employees. The Union stated that the "request for that information was not based on a claim to represent all the Buena employees." Rather, the Union needed the information because it could not "intelligently bargain over the rates and benefits for Vineland employees to work at Buena, without knowing how a possible proposal compares to the wages, benefits and other terms and conditions of employment of other hourly workers at the same location (Buena)." The Union also stated that "effects bargaining includes the physical location at Buena of the relocated Vineland employees," and that the way the work areas were configured, and the locations of all workers, were relevant to that issue. At the hearing, Timothy Tuttle (the Union official assigned to lead the bargaining effort) testified that another reason the Union wanted this information was for use in negotiations over the placement of bargaining unit employees in other positions at Buena as part of effects bargaining. With the September 15 letter, the Union provided the Respondent with the information sought in the company's September 2 information request.

Although the Respondent had indicated that it would provide the Union with all the information regarding the former Vineland unit employees within 2 or 3 weeks of the request, the Respondent did not provide any of that information for over 4 months. The correspondence between the parties indicates that the Respondent did not provide the information until the Union re-submitted the September 1 request on December 28, and brought the matter to the Respondent's attention again in a January 3, 2005, letter. On January 6, 2005, when it first provided information in response to the September 1 request, the Respondent turned over a total of 13 pages of documents, which the Respondent said represented "the majority of the

information" requested.[19] On January 24, 2005, the Respondent provided the Union with additional information -- insurance plan description documents and pay stubs showing employees' annual medical insurance contributions. According to Tuttle there was no other information that the Union was seeking at that time regarding the unit employees. [20]

William Hughes -- who as the Respondent's Human Resource's Director coordinated the collection of the information -- testified concerning the delay. He did not attempt to explain the delay by claiming that the information requested by the Union was voluminous or that it took many days or weeks to gather. Rather, he testified that he had been preoccupied responding to requests from the Board's regional office for information relating to the preparation of a compliance specification. The regional office made the first such request on September 8 – after the Union's September 1 information request. Hughes stated that he believed the Board's information request took precedence over the Union's earlier request. On October 1, 2004, the Respondent supplied the Board's agent with information responsive to the September 8 request, but additional information requests followed. Hughes stated that during the period from early September 2004 to January 2005 he was spending 60 to 65 percent of his work time responding to the Board's requests. Hughes also testified that he sustained a brain injury in February 2004 and that, as a result of that injury, he has cognitive problems and has to "take a lot of notes and write things down in order to stay on track." These factors, he testified, accounted for the Respondent's delay in providing the Union with the requested information regarding employees who had formerly worked in bargaining unit positions at Vineland.

On January 18, 2005, the Respondent and the Union met for the purpose of bargaining over the effects of the relocation of unit work to the Buena facility. At that meeting, counsel for the Union renewed the request for information about non-unit employees and expressly stated that by meeting the Union was not waiving its right to that information. Counsel for the Respondent reaffirmed the company's position that it was refusing to provide any information on non-unit employees. Counsel for the Respondent did, however, make a statement that "all employees at Buena are paid the same rates for the same job." The record indicates that this representation by Respondent's counsel was inaccurate, or at least misleading. Documents subsequently produced by the Respondent show that employees at Buena were often paid different rates even when they held the same positions in the same departments. See Respondent's Exhibit (R Exh.) 58.

On November 1, 2005 – the eve of the hearing – the Respondent surrendered much of the information sought in the complaint. This was over 9 months after the Union's January 18 verbal request for the information, and 14 months after the Union's September 1, 2004, written

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[19] Those 13 pages were: a memorandum transmitting the information (1 page); a list of the Vineland employees who accepted transfer to Buena (1 page); a spreadsheet showing each transferred employees' job title, job location within the plant, assignment, shift, average hours worked, immediate supervisor, and shift differential (2 pages); a list showing the average weekly hours worked for each transferred employee (1 page); a payroll printout for the transferred employees (4 pages); a statement of the terms and conditions of employment for the transferred employees (2 pages); a statement of the weekly insurance contributions paid by the transferred employees for their medical coverage (1 page); a list of the two other Comar plant closings since April 1999, with information on severance benefits (1 page).

[20] On July 15, 2005, the Respondent provided the Union with a company handbook, which Hughes said he had inadvertently failed to include with the materials supplied earlier. This had not been specifically requested by the Union in its September 1 information request, and Tuttle's testimony indicated that the Union did not consider it to be covered by that request.

request. The Respondent still refused to provide the names of the individual non-unit employees – referring to them only by initials -- and did not reveal the amount of contributions made by the employees and the Respondent towards healthcare benefits. At the hearing, Tuttle testified regarding the Respondent's last-minute production of information regarding non-unit employees. On cross-examination, Tuttle was asked why the Union needed to know the names of the non-unit employees. He responded, "It was important to know who we were talking about and where these individuals worked and what equipment they worked on," and "who worked on a specific machine" so that "we were informed as to . . . the operation in Buena."[21]

IX. Bargaining Concerning Effects of Relocation

On August 18, 2004 – subsequent to the Court of Appeals decision enforcing the Board's order – the Union made a written request that the Respondent "bargain in good faith with the [Union] concerning the effects on unit employees of the relocation of unit work from Comar, Inc.'s Vineland, NJ facility to its Buena, NJ facility."[22] This set off a round of correspondence in which both sides offered dates for bargaining regarding effects, but were unable to settle on a bargaining date for almost 5 months.

The record indicates that the Respondent did not answer the Union's August 18 request to bargain directly, but that in an August 26 letter to the Board's regional office, the Respondent expressed a willingness to engage in effects bargaining "if" the Union requested such bargaining. The Respondent provided a copy of this letter to the Union on August 27. In a September 1, 2004, letter, the Union again requested that the Respondent bargain over the effects of the relocation. The Respondent replied in a September 2 letter by stating that it was willing to engage in effects bargaining and asked for dates when the Union could meet in September and October. In the same letter, the Respondent stated that it was refusing to provide the Union with information regarding any employees who had not been unit members at the Vineland facility. The Union responded by letter on September 15, stating that it could meet for effects bargaining on September 30 or October 1. The Union also stated that it viewed the Respondent's refusal to produce the requested information as a failure to bargain, and that "[b]y

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[21] In its brief, the Respondent alleges that certain events occurred after the close of the hearing. The Union has moved to strike these assertions, which are found in footnotes 34 and 36 of the Respondent's Brief. I hereby grant the Respondent's motion to strike those assertions which are completely unsubstantiated by any record evidence in this case. The Union also moves to strike footnote 29 in the Respondent's Brief, which makes an argument based on an offer of proof that Respondent's counsel made after I excluded testimony concerning the Union's alleged misconduct in unrelated dealings with a different employer. That testimony is outside the record, and I grant the Respondent's motion to strike footnote 29. The Union and the General Counsel also move to strike multiple other defenses and contentions raised by the Respondent in its answer to the compliance specification and its brief. Most of those additional requests to strike are, in reality, nothing more than arguments about how to analyze the facts and law in this matter, and the remaining requests to strike are mooted by my other findings and conclusions. Therefore, the Union's motion to strike is denied, except to the extent stated above, and the General Counsel's motion to strike is denied in its entirety. The Respondent's motion, which asks me to strike portions of the Union's motion to strike is moot, given my decision to deny the relief sought in those portions of the Union's motion.

[22] As discussed above, the Union had previously requested bargaining shortly after the issuance of the administrative law judge's decision and again shortly after the issuance of the Board's decision.

meeting, the Union [wa]s not waiving its rights to requested information for bargaining." In a September 27 letter, the Respondent stated that it was unavailable to meet on the dates offered by the Union, but that it could meet on October 8. The Union responded that it was available to meet on October 27. The correspondence indicates that the Respondent rejected that date, but offered to meet on November 8, December 13, or December 14. In an October 18 letter, the Union stated that it was willing to meet on any of those dates and asked the Respondent to respond. As of November 22, the Respondent had not answered the Union's October 18 letter, and the Union wrote to the Respondent again to try to arrange a meeting on either of the December dates. In a letter dated November 23, 2004, the Respondent's attorney stated that he had not received the Union's October 18 letter, and that the company was not available to bargain on December 13 and 14. The letter stated that when the Respondent's attorney returned from vacation he would contact the Union regarding new dates for bargaining. The Respondent's attorney apparently did not contact the Union with new dates until over a month later, on December 28. On that date, according to correspondence in the record, the Respondent's attorney asked the Union to provide dates when it could meet in January 2005 for effects bargaining. In a letter dated January 3, 2005, the Union responded that it was available to meet on January 18, 24, or 26, 2005. The Respondent agreed to meet on January 18.

That meeting took place, as agreed, on January 18. Attending for the Union were: Tuttle; James LaVaute (Attorney for the Union), John Shinn (staff representative), Anthony "Skip" Wiessner (officer with union local), and Catherine Guilford (officer with union local). Present for the Union were Joel Cohen (Attorney for the Respondent) and Hughes. At the meeting, LaVaute stated that the Union needed the information regarding non-unit employees at the Buena facility for purposes of effects bargaining as explained in the September 15 letter, and that the Union could not make proposals without it. Cohen responded that the Union did not represent the non-unit employees and that the Respondent refused to provide information regarding them. Cohen did, however, agree to provide additional information regarding the Vineland unit employees. LaVaute suggested that the parties could resolve their dispute if the Union agreed to a substantial reduction in backpay in exchange for the Respondent recognizing the Union, entering into a new contract, and reinstating those unit employees who had not already been reinstated. Cohen answered that the Respondent would not recognize the Union or enter into a new contract. He stated that the employees who were in the unit at the Vineland facility had been "co-mingled" at the Buena facility, and that the Union no longer represented them.

LaVaute asked if the Respondent had any proposals of its own to make, and Cohen responded that the Respondent would not make any proposals until it received backpay calculations from the Board.[23] There was some discussion of the amount of backpay that was due. LaVaute expressed the view that the Union could not go any further until the Respondent supplied the information that had been requested. Cohen asked the Union to state additional dates when it could bargain, and LaVaute responded that the Union would bargain when the

[23] Tuttle testified that Cohen made this statement at the January 18 meeting. Transcript Page (Tr.) 51. Hughes, on the other hand, testified that he did not recall Cohen making such a statement, Tr. 464, 471-72, but he also indicated that he was not certain the statement was not made, Tr. 473. As discussed above, Hughes also candidly stated that his cognitive functioning was compromised due to a brain injury. Based on their demeanor and testimony, I believe that both Tuttle and Hughes testified honestly to the best of their recollections regarding the January 18 meeting. However, under the circumstances, I credit Tuttle's clear and certain testimony regarding the statement by Cohen greater weight than Hughes' less-than-emphatic testimony that he did not remember Cohen making the statement.

Respondent provided the information the Union was seeking. Subsequently, the Respondent continued to withhold information regarding non-unit employees at Buena.[24] No additional dates for effects bargaining were suggested by either side.

At the time of the 2004-05 discussions regarding effects bargaining, the Respondent had not rescinded the new working conditions that it unilaterally imposed on the unit employees who transferred to Buena. The Board has already found, and the Court of Appeals affirmed, that those changes were in violation of the Act.

Analysis and Discussion

I. The Unfair Labor Practices Complaint

The unfair labor practices complaint alleges that the Respondent has failed to bargain in violation of section 8(a)(5) and (1) of the Act: from September 1, 2004, until on or about January 7, 2005, by failing to furnish the Union with requested information concerning unit employees that is necessary for bargaining; from September 1, 2004, until on or about July 15, 2005, by failing to furnish the Union with requested information concerning unit employees' benefits that is necessary for bargaining; since about January 18, 2005, by failing and refusing to furnish the Union with requested information regarding all non-unit hourly employees at the Buena facility. For the reasons discussed below, I conclude that the Union was entitled to the information it sought from the Respondent in its September 1, 2004, written request, and its January 18, 2005, verbal request, and that the Respondent violated the Act by refusing to provide some of that information and supplying other information only after an unreasonable delay. [25]

With respect to the information that the Union sought about unit employees, the Respondent does not contest the Union's entitlement and indeed such information is presumptively relevant to bargaining. See *Quality Building Contractors*, 342 NLRB No. 38, slip op. at 3 (2004); *Western Massachusetts Electric Company*, 234 NLRB 118, 118-19 (1978), enfd. 589 F.2d 42 (1st Cir. 1978). Nevertheless, the Respondent did not provide *any* of that information until over 4 months after the Union requested it. An employer's "unreasonable delay in furnishing such information is as much of a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all." *Amersig Graphics, Inc*., 334 NLRB 880, 885 (2001); see also *Britt Metal Processing*, 322 NLRB 421, 425 (1996), affd. 134 F.3d 385 (11th Cir. 1997) (Table); *Leland Stanford Junior University*, 307 NLRB 75, 80 (1992); *Valley Inventory Service*, 295 NLRB 1163, 1166 (1989). "Absent evidence justifying an employer's delay in furnishing a union with relevant information, such a delay will constitute a violation . . . inasmuch '[a]s the Union was entitled to the information at the time it made its initial request, [and] it was [the employer's] duty to furnish it as promptly as possible.'" *Woodland Clinic*, 331 NLRB 735, 737 (2000), quoting *Pennco, Inc.*, 212 NLRB 677, 678 (1974).

The Board evaluates the reasonableness of an employer's delay in supplying information based on "the complexity and extent of the information sought, its availability and

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[24] As discussed above, on the eve of the hearing concerning the information requests, the Respondent surrendered most of the information that the Union had been seeking regarding non-unit employees.

[25] The Respondent's answer to the complaint includes, as an affirmative defense, an assertion that the "allegations of the complaint are time-barred." The Respondent did not press, or explain, this defense in its brief or at the hearing and I conclude that it has been abandoned.

the difficulty in retrieving the information." *Samaritan Medical Center*, 319 NLRB 392, 398 (1995), citing *Postal Service*, 308 NLRB 547 (1992). I have reviewed the 13 pages that the Respondent provided on January 6 – following a delay of over 4 months – and conclude that the information could readily have been prepared within a few days or weeks of the Union's request. The Respondent has not introduced any evidence to show that, contrary to appearances, this information was particularly complex, voluminous, or burdensome to provide. The provision of other responsive information was delayed even longer – until January 24, 2005, when it was too late for use by the Union at the January 18 bargaining session. The Board has consistently found delays of considerably less than 4 months duration to be unreasonable. See *Pan American Grain*, 343 NLRB No. 47 (2004), enfd. in relevant part, 432 F.3d 69 (1st Cir. 2005) (3-month delay unreasonable); *Bundy Corp.*, 292 NLRB 671 (1989) (delay of 2.5 months violates the Act); *Woodland Clinic*, 331 NLRB at 737(delay of 7 weeks violates the Act). The Respondent has not identified any cases in which the Board has approved a delay of over 4 months, and certainly none in which the Board excused such a delay where the information sought was not unusually complex, voluminous, or difficult to retrieve.

The Respondent contends that its delay in supplying the Union with information was reasonable because the company was busy responding to information requests from the Board's regional office. This argument is not supported as a matter of law or, given the facts, as a matter of common sense. First, as noted above, the Board evaluates the reasonableness of delays in supplying information based on the burdensomeness of the information requested. An employer cannot justify delays in supplying information on the basis of other, unrelated, demands on its time. See, e.g., *Daimler-Chrysler Corp.*, 344 NLRB No. 154, slip op. at 1 and 16 (2005); *Samaritan Medical Center*, 319 NLRB at 398; *Bundy Corp.*, 292 NLRB at 672. From a practical standpoint, the Union's request in this case was made 7 days before the regional office's September 8 request. Therefore, the Respondent could have compiled much, if not all, of the information eventually provided to the Union on January 6, 2005, even before the regional office made the information request on which the Respondent tries to blame the delay.

For the reasons stated above, I find that the Respondent violated Section 8(a)(5) and (1) by unreasonably delaying the provision of information regarding unit employees that the Union requested in its September 1, 2004, letter. [26]

Regarding the Union's information request for information about non-unit employees, the Respondent argues that the Union is not entitled to such information because it is "not relevant." For employees outside the bargaining unit, the Union bears the burden of establishing relevancy. *Tri-State Generation*, 332 NLRB 910 (2000). However, that burden is not an exceptionally heavy one, requiring only a showing of "probability that the desired information [i]s relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities." *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967); *Shoppers Food Warehouse*, 315 NLRB 258, 259 (1994); *Postal Service*, 310 NLRB 391-92 (1993). "The Board uses a broad, discovery-type of standard in determining relevance in information requests, including those for which a special demonstration of relevance is needed, and potential or probable relevance is sufficient to give rise to an employer's obligation to provide information."

[26] Given the finding that the Respondent unreasonably delayed providing information on unit employees when it waited until January 6 and January 24, 2004, to respond to the Union's September 1, 2004, request, it is not necessary for me to reach the issue of whether the Respondent's further delay until July 15, 2005, before supplying other information on unit employees was also unreasonable. Such a further finding would be cumulative and would not affect the remedy. See *Daimler-Chrysler Corporation*, 344 NLRB No. 154, slip op. at 1.

Shoppers Food Warehouse, 315 NLRB at 259; see also *Acme Industrial*, 385 U.S. at 437 and fn. 6; see also *Kathleen's Bakeshop*, 337 NLRB 1081, 1093 (2002), enfd. 2003 WL 22221353 (2d. Cir. 2003).

As discussed above, the Union informed the Respondent that it was seeking the information regarding non-unit employees because it could not "intelligently bargain over the rates and benefits for Vineland employees to work at Buena, without knowing how a possible proposal compares to the wages, benefits and other terms and conditions of employment of other hourly workers at the same location (Buena)." The Union stated that it needed information about non-unit employees' work locations and assignments so that it could negotiate over the physical locations where the relocated Vineland unit employees would be working at the Buena facility, and over the transfer of unit employees into non-unit positions at Buena. Tuttle explained the request for the names of the non-unit employees by stating that "[i]t was important to know who we were talking about and where these individuals worked and what equipment they worked on," and "who worked on a specific machine" so that the Union would be informed about "the operation at Buena." The Union also states that it needs to contact those employees about the specifics of their non-unit positions so that it can decide whether it is desirable to transfer members to non-unit positions. According to the Union, it also requires the names of the non-unit employees in order to verify the information that the Respondent has provided about those employees.

With respect to the information that the Union requested about the terms and conditions of employment of non-unit employees at Buena, the evidence clearly shows a "probability that the desired information is relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities." *NLRB v. Acme Industrial Co.*, supra. Even if one were to accept the Respondent's claim that the unit ceased to exist subsequent to the May 2001 hearing, the company would still have an obligation to bargain over the effects of the relocation of unit work from the Vineland facility to the Buena facility. That obligation includes bargaining over the relocated workers' wages, work locations, schedules, carryover of seniority and other terms and conditions of employment at the new plant, as well as over the conditions of the transfer. *Comar*, 339 NLRB at 913; *Sea Jet Trucking Corp*., 327 NLRB 540, 547 (1999), review denied, 221 F.3d 196 (D.C.Cir. 2000) (Table); *Holly Farms Corp*., 311 NLRB 273, 279 fn.25 (1993), enfd. 48 F.3d 1360 (4th Cir. 1995), affd. 517 U.S. 392 (1996); *Allied Mills*, 218 NLRB 281, 286-87 (1975), enfd. 543 F.2d 417 (D.C. Cir. 1976) (Table), cert. denied 431 U.S. 937 (1977); *Cooper Thermometer Co.*, 160 NLRB 1902, 1911-12 (1966), enfd. 376 F.2d 684 (2d Cir. 1967). In *Kathleen's Bakeshop*, 337 NLRB at 1093, the Board ruled that a union was entitled to information regarding the wages and benefits of non-unit employees for purposes of negotiating over the effects of an employer's decision to relocate unit work. See also *Frito-Lay, Inc.*, 333 NLRB 1296 (2001), vacated 51 Fed.Appx. 482 (5th Cir. 2002) (union is entitled to information about employees at facilities outside the bargaining unit in order to bargain knowledgeably about the employer's wage policy). In the instant case, the information sought by the Union regarding the terms and conditions of other employees working at the Buena facility is not only of probable relevance to those issues, but it is hard to imagine how the Union could bargain intelligently about such issues without that type of information. After the Union made its January 18, 2005, verbal request for the information regarding the non-unit employees, the Respondent unreasonably delayed providing any of the information for over 9 months – relenting only a day before the hearing in this matter.

With respect to the Union's request that the Respondent provide the names of the non-unit employees who occupy the various positions at the Buena facility, the question is somewhat closer. On balance, I conclude there is a probability that such information, by helping the Union to investigate the positive and negative aspects of specific positions outside the unit, would be

of use to the Union in negotiations over the transfer of its members to such positions at the Buena facility. *Western Electric, Inc.*, 225 NLRB 1374, 1377-78 (1976), enf. denied 559 F.2d 1131 (8th Cir. 1977) (names of non-unit employees must be provided where relevant to issue of transfer of personnel between non-unit and unit positions); see also *AGA Gas, Inc.*, 307 NLRB 1327 (1992) (employer required to provide names of non-unit workers allegedly performing unit work): *Westinghouse Elec. Corp.*, 304 NLRB 703, 708 (1991) (employer required to provide names of non-unit members where information is relevant to grievance over discipline of unit member); *Depository Trust Co.*, 300 NLRB 700, 704 (1990) (employer required to provide names of non-unit workers allegedly performing unit work). Information associating particular individuals with the positions they hold would assist the Union in deciding which non-unit employees to contact, and in discussing specific non-unit positions with employees who were willing to provide information. I recognize that the Union could attempt such inquiries without knowing the identities of the individuals who hold particular non-unit positions, however I believe that such a limitation would unnecessarily hamper the Union's efforts. I also conclude that the Union is entitled to the names of non-unit employees for use in verifying the accuracy of the information provided by the Respondent regarding the terms and conditions that non-unit employees are working under. As discussed above, the Respondent previously made an inaccurate or misleading representation to the Union regarding the wages of non-unit employees at Buena. Moreover, the document that the Respondent provided to the Union showing the terms of non-unit positions is a summary document -- apparently created for purposes of supplying the information -- and therefore is somewhat less reliable than original business records would have been. Under these circumstances, I conclude that the Union should not have to take the employer's word that information provided is an accurate or complete response to the request, but rather is entitled to information from which it is possible to verify the response. See *New York Telephone Co*., 299 NLRB 351, 357 (1990), enfd. 930 F.2d 1009 (2d Cir. 1991) (union does not have to take the employer's word that information provided is complete, but is entitled to information from which it may verify the response).

The Respondent asserts confidentiality concerns as a basis for withholding the names of the employees. Such concerns must be "legitimate and substantial" in order to outweigh the Union's entitlement to relevant information. *International Protective Services, Inc.*, 339 NLRB 701, 704 (2003); *Pennsylvania Power Co.*, 301 NLRB 1104, 1105-06 (1991). In this case, the record provides no basis for suspecting that the Union intends to use the employees' names for improper purposes or in any other manner that would disseminate confidential information. The evidence does not show that the Respondent is engaged in an effort to organize non-unit employees at Buena. Although the disclosure of individual employees' wage and benefit information to the Union implicates privacy concerns to some extent, the Board has generally found that, without more, such concerns do not justify withholding information that is relevant to the Union's role as bargaining representative. See, e.g., *King Broadcasting Co*., 324 NLRB 332, 338 (1997); *AGA Gas, Inc.*, supra: *Westinghouse Elec. Corp.*, supra; *Depository Trust Co.*, supra; *Western Electric*, supra. In the instant case, the terms under which individual employees are working were not shown to be so personalized as to raise substantial privacy concerns. [27]

[27] The Respondent cites *Times-Herald, Inc.*, 258 NLRB 1041, 1041-42 (1981), in which the Board refused to order the employer to provide a union that represented newspaper writers with information showing the specific amounts that non-unit columnists and correspondents were being paid. In that case, the Union claimed that it needed the information to make wage proposals for writers who were part of the unit, but the Board found that the union was, in fact, premising its wage proposals on factors other than the compensation of non-unit employees, and that the amounts paid to the non-unit employees such as columnists were not "directly translatable" to the hourly compensation of the unit employees. Given the doubts raised in

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There is no reason to believe that disclosure of the names would somehow reveal medical history or other sensitive information about the individuals. The Respondent did not show that non-unit employees objected to having the information regarding their individual terms and conditions of employment shared with the Union. Nor was there testimony showing that the Respondent generally made special efforts to keep such information secret within the Buena facility, or that non-unit employees had a reasonable expectation of privacy with respect to such information.[28]

For the reasons stated above, I find that the Respondent violated Section 8(a)(5) and (1) of the Act by unreasonably delaying the provision of information regarding non-unit employees that the Union verbally requested on January 18, 2005. In addition, I find that the Respondent violated Section 8(a)(5) and (1) of the Act by withholding the names of the non-unit employees, and information regarding the amount of contributions made by employees and the Respondent towards healthcare benefits, both of which were encompassed by the Union's verbal request on January 18, 2005.

II. Compliance Specification

The compliance specification implements the remedy ordered by the Board's decision in *Comar, Inc.*, 339 NLRB 903 (2003), and enforced by the D.C. Circuit, 111 Fed.Appx. 1 (D.C.Cir. 2004). It sets forth specific monetary awards for the two groups of employees who, under the Board's order, are entitled to relief as victims of the Respondent's unlawful conduct. One of those groups – referred to in the compliance specification as "Class A" – is comprised of the unit employees who accepted transfers from the Vineland facility to the Buena facility. The other group – referred to as "Class B" – is comprised of those who were effectively discharged at the time of the relocation. The calculations in the compliance specification cover the period beginning on September 27, 1999, and continuing, for most employees, through the 4th quarter of 2004, although the General Counsel's position is that relief continues to accrue subsequent to that period. The monetary relief for employees includes both make-whole relief (net backpay, 401(k) contributions, medical insurance premiums, unreimbursed medical expenses, life insurance) and a concurrent *Transmarine* remedy.[29] The compliance specification also

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Times-Herald regarding the relevance of the employee-specific information requested there, it is likely that the Board would have declined to order the production of the employee-specific wage information, even aside from any concerns about privacy. Moreover, the columnist compensation arrangements appear to have been more personalized, and therefore arguably more private, than the wage information for hourly employees at the Respondent's Buena facility.

[28] In its brief, the Respondent raises the specter that complying with the Union's information request will result in the release of employees' social security numbers. That argument is a red herring. The Union's request does not specifically or implicitly encompass social security numbers and there is no allegation in the complaint that the Respondent violated the Act by withholding such information.

[29] For most of the employees, the compliance specification accrues the *Transmarine* remedy for a period beginning after the issuance of the Board's decision and continuing through the rest of the backpay period. An exception is made in the case of Michele Guilford, who died on April 6, 2003, and for whom the *Transmarine* remedy is limited to 2 weeks. The backpay period is also terminated for two individuals, Mary Cione and Lenell Stewart, as of the dates of their retirements.

reiterates the Respondent's obligation, under the Board's order, to recognize and bargain with the Union, to bargain with the Union over the effects of the relocation, and to provide information.[30]

The Respondent admits to the appropriateness of the formulas employed in the compliance specification, as well as to the accuracy of the data used. However, the Respondent makes a number of arguments that, if accepted, would dramatically reduce the monetary awards. First, the Respondent argues that the bargaining unit was eliminated as of September 30, 2001, because of changes in the company's operations and that no backpay should accrue after that date. The Respondent also argues that, because the bargaining unit has been eliminated, the company is not required to comply with the Board's order to recognize the Union, bargain for a new collective bargaining agreement, and refrain from making unilateral changes to unit employees' terms and conditions of employment. Second, the Respondent contends that even if the backpay period continues, relief for the group of discharged employees should cease as of August 29, 2003, because on that date the company sent letters to employees offering them employment. For the same reason, the Respondent argues that reinstatement is no longer an appropriate remedy for those individuals. Third, the Respondent contends that the discharged employees are not entitled to reinstatement because downsizing at the Buena facility caused their positions to be eliminated and open positions are not available. Fourth, the Respondent argues that the *Transmarine* remedy for each employee should accrue for no more than the 2-week minimum period stated in the order because requiring the payment of an ongoing *Transmarine* remedy for the same periods as for make-relief would be punitive. The Respondent argues that if the *Transmarine* remedy is not limited to the 2-week minimum period the calculations in the compliance specification are still excessive because those calculations do not deduct the amount of employees' interim earnings, or recognize that employees have secured equivalent employment. The Respondent further argues that the *Transmarine* remedy should be tolled because the company was willing to engage in effects bargaining, but the Union failed to adequately pursue such bargaining.

The burden is on the employer who committed the unfair labor practice to establish facts that reduce the amount due for gross backpay. *Atlantic Limousine,* 328 NLRB 257, 258 (1999), enfd. 243 F.3d 711 (3d Cir. 2001); *Florida Tile Co*., 310 NLRB 609 (1993), enfd. 19 F.3d 36 (11th Cir. 1994) (Table). Any uncertainty about how much backpay should be awarded to a discriminatee is resolved in his or her favor and against the respondent whose violation caused the uncertainty. *Alaska Pulp Corp.*, 326 NLRB 522 (1998), enfd. in part and principle approved 231 F.3d 1156 (9th Cir. 2000); *Intermountain Rural Electric Assn.*, 317 NLRB 588, 590-91 (1995), enfd. 83 F.3d 432 (10th Cir. 1996) (Table). For the reasons discussed below, I reject each of the Respondent's arguments for limiting the remedy set forth in the compliance specification.

[30] The Respondent expresses concern that the General Counsel is somehow attempting to bring the entire finishing department at the Buena facility within the bargaining unit. That concern is misplaced. The compliance specification does not seek relief for any individuals other than those who were part of the bargaining unit at the Vineland facility. Neither the General Counsel nor the Charging Party has asked that I alter the unit definition set forth in the underlying decision. That decision directs that the unit description will remain in effect "until the parties themselves agree to modify [it]."

A. Respondent Has Not Established that the Bargaining Unit Ceased to Exist as of September 30, 2001

As discussed above, the Respondent previously argued to Judge Kocol, to the Board, and to the Court of Appeals, that the long-standing bargaining unit that was relocated from the Vineland facility had lost its identity in the larger Buena workforce, and ceased to exist as of the time of the prior hearing in May 2001. That argument was rejected at each of those levels of consideration. In this compliance proceeding, the Respondent raises the same argument again, changing only the date – contending now that if the bargaining unit did not cease to exist as of the prior hearing, then it ceased to exist approximately 4 months later on September 30, 2001. I conclude that this line of argument is precluded by the Respondent's failure to meet its obligations, previously established under the Board's order, to recognize the Union, bargain in good faith for a new contract, bargain over the effects of the relocation, and rescind the unlawful unilateral changes it made to the terms and conditions of unit employees. In the alternative, I conclude that the Respondent has failed to establish that the unit ceased to exist.

The Board held, in *Holly Farms Corp*., that when an employer withdraws recognition based on a claim that the unit has been assimilated into the employer's larger work force, "the changed nature of the operations should be assessed at the time the withdrawal of recognition occurred," unless "there is a well-defined plan or timetable for achieving full functional integration of operations." 311 NLRB 273, 279 (1993), enfd. 48 F.3d 1360 (4th Cir. 1995), affd. 517 U.S. 392 (1996). In the instant case, the Respondent withdrew recognition from the Union at the time of the relocation in September 1999 and has never restored that recognition, despite the Board's order requiring it to do so. Moreover, the Board has already ruled that the Respondent withdrew recognition without a well-defined plan for integration of operations. *Comar*, 339 NLRB at 911. Thus under the principle stated in *Holly Farms*, the Respondent's argument in this compliance proceeding that the unit has been assimilated must still be evaluated as of the time the Respondent withdrew recognition -- that is, as of September 1999. The Board has already decided that question unfavorably to the Respondent in the underlying unfair labor practices proceeding, and I am bound by that decision in the compliance stage. Therefore, I conclude that under the law of the case and applicable Board precedent, any argument by the Respondent that changes it made to operations entitle it to withdraw recognition from the Union is precluded until the Respondent restores recognition and bargains for a reasonable period of time as required by the Board's enforced order.

The conclusion that the Respondent must first comply with the Board's existing order to recognize and bargain with the Union and rescind the unlawful changes before attempting, once again, to argue that the unit has been assimilated is also supported by analogous precedent in cases involving employer claims that a union has lost majority support. In those cases, the Board has held that when a bargaining relationship is restored after an employer unlawfully withdraws recognition from an incumbent union, the bargaining relationship "'must be given a reasonable time to work and a fair chance to succeed' before the union's representative status can properly be challenged." *Lee Lumber & Building Material Corp.*, 334 NLRB 399, 401 (2001), enfd. 310 F.3d 209 (D.C. Cir. 2002); see also *Williams Enterprises*, 312 NLRB 937, 941 (1993), enfd. 50 F.3d 1280 (4th Cir. 1995) (When employer unlawfully refuses to recognize a bargaining relationship rightfully established, that bargaining relationship must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed.).

This rule has two related, important, purposes. The first is to ensure that the lingering effects of the employer's unlawful refusal to recognize the union and bargain have been overcome before the union's representative status is re-evaluated. *Lee Lumber*, supra; see also *Williams Enterprise*, 312 NLRB at 940-41 (when employer unlawfully withdraws recognition, the

rule prevents "the employer from profiting from predictably adverse effects of its wrongdoing"). Similarly, it is necessary in the instant case to eliminate the lingering effects of the employer's unlawful refusal to recognize and bargain with the Union before the continuing status of the unit can be fairly evaluated. It is clear that the Respondent's unlawful withdrawal of recognition, refusal to bargain, and unilateral changes detracted from the distinctness of the unit. That was recognized by Judge Kocol in the underlying decision. *Comar*, 339 NLRB at 910. For example, if the Respondent had not unlawfully eliminated the unit employees' unique terms and conditions of employment under the collective bargaining agreement -- including their special wages, leave benefits, pension system, seniority rights, and job tenure protections and preferences – those terms and conditions would weigh on the side of judging the unit as distinct from the rest of the workforce at the Buena facility. See *Mirage Casino-Hotel*, 338 NLRB 529, 532 (2002); *Skyline Distributors*, 319 NLRB 270, 270 fn.2 and 278 (1995); *Super K Mart Center*, 323 NLRB 582, 588 (1997). Indeed, in arguing that the unit has been assimilated, the Respondent relies upon its unlawful and unremedied changes to unit employees' compensation – stating that the unit is no longer appropriate, in part, because unit and non-unit members now share common compensation. Respondent's Brief at 32. Moreover, although one cannot know with any precision what the results would have been if the Respondent had met its obligation to bargain with the Union for a new collective bargaining agreement[31] and over the effects of the relocation, it is safe to assume that whatever those results were, they would have been more likely to bolster the distinct character of the unit than are the results that followed from the Respondent's unlawful exercise of its unilateral will on the terms and conditions of the unit employees. The unilateral changes and other unlawful conduct must be remedied, as required by the Board's enforced order, before the state of the unit can be evaluated fairly.

Secondly, permitting an employer that unlawfully denies recognition to a union to challenge that union's representative status again at a later date in the proceedings without first complying with its obligation to recognize and bargain, would permit that employer to indefinitely postpone compliance with its bargaining obligations. In *Williams Enterprises*, 312 NLRB at 940-41, the Board recognized this problem, and held that it justified the imposition of a requirement that the employer first meet its statutory obligation to bargain before the Board would consider whether the union had subsequently lost its representative status. To explain its holding, the Board quoted at length from *Franks Bros. Co. v. NLRB*, 321 U.S. 702 (1944), in which the Supreme Court stated:

> The Board might well think that, were it not to adopt this type of remedy, but instead order elections upon every claim that a shift in union membership had occurred during proceedings occasioned by an employer's wrongful refusal to bargain, recalcitrant employers might be able by continued opposition to union membership indefinitely to postpone performance of their statutory obligation. In the Board's view, procedural delays necessary fairly to determine charges of unfair labor practices might in this way be made the occasion for further procedural delays in connection with repeated requests for elections, thus providing employers a chance to profit from a stubborn refusal to abide by the law. That the Board was within its statutory authority in adopting the remedy which it has adopted to foreclose the probability of such frustrations of the Act seems too plain for anything but statement.

[31] Even under the Respondent's argument in this compliance proceeding, the company had an obligation from September 27, 1999 to September 31, 2001, to bargain with the Union for a new contract. The Respondent did not do so.

321 U.S. at 705, quoted in *Williams Enterprises*, 312 NLRB at 940-41. The same problem is present in the instant case. The Respondent first unlawfully withdrew recognition from the Union in September 1997 and has never restored that recognition and bargained with the Union. The Respondent has not even rescinded the unlawful changes already found by the Board in the underlying decision. Nevertheless, it argues in this compliance proceeding that it should now be excused from ever complying with the order to recognize and bargain with the Union because the unit ceased to exist during the period of the company's continued refusal to abide by the law. In its answer to the compliance specification, the Respondent argues that the unit went out of existence on September 31, 2001, and in its brief it contends that if the unit did not go out of existence on that date, then it did so in December 2002. Assuming the Board considered and rejected those dates, what would stop the Respondent from continuing to refuse to bargain based on a claim that the unit ceased to exist at an even later date? All the while, the Respondent's recalcitrance would work to its advantage by continuing to delay bargaining, create the opportunity for unilateral changes, and otherwise permit degradation of the unit. Under these circumstances, I conclude that the Respondent must recognize the Union, rescind the unilateral changes, and give the bargaining relationship between the Respondent and the Union "a reasonable time to work and a fair chance to succeed" before reasserting its challenge to the viability of the unit. Any other result will allow the Respondent to use the fruits of its unlawful withdrawal of recognition and unilateral changes to legitimize continuing that conduct indefinitely. See *Superior Protection, Inc.*, 341 NLRB 614, 615 fn.5 (2004), enfd. 401 F.3d 282 (5th Cir. 2005), cert. denied 126 S. Ct. 244 (2005); *Georgia-Pacific Corp.*, 329 NLRB 67, 74-75 (1999); *Holly Farms*, 311 NLRB at 279.[32]

In the alternative, I conclude that the Respondent has failed to demonstrate that the character of the unit had changed significantly between the time of the May 2001 hearing before Judge Kocol and September 31, 2001 – the date the Respondent gives in its answer as marking the elimination of the unit. The Respondent points to nothing that occurred during that approximately 4-month period that rendered the unit any less appropriate. The Respondent discusses the company's reduced use of the rotary machines in favor of more automated equipment, and the movement of much of the relocated applicator division operation from the manufacturing building to the finishing building; however, those changes had not occurred as of September 31, 2001. Indeed, the record indicates that on September 31, 2001, the Respondent was using the same number of rotary machines as it had in May 2001, and was operating those machines for even more hours than it had at the earlier time.

[32] This holding is not contrary to the statement in the underlying decision that "the Respondent can offer, in the compliance proceedings, evidence of changes to its operations that occurred after the hearing, to the extent that such changes might affect the remedy." *Comar*, 339 NLRB at 903 fn.1. First, the Board's decision merely stated that the Respondent could introduce evidence of changes that "might" affect the remedy, it did not state that any particular types of changes necessarily would affect the remedy. At any rate, my ruling is only that the Respondent is precluded at this juncture from attempting to limit the remedy based on an argument that the unit has ceased to exist – an argument already rejected by the Board. The Respondent can, and does, still seek to limit the remedy based on evidence of changed circumstances unrelated to the alleged assimilation of the unit. For example, as discussed below, the Respondent argues that the remedy should be limited for the discharged employees because they would have been discharged subsequently for lawful reasons. Moreover, lawful posthearing changes could have been considered in determining whether the unit had ceased to exist if the Respondent had first met its obligations under the Board's order to rescind its unilateral changes, recognize the Union, bargain for a new contract and so on.

In its brief, the Respondent posits December 2002 as another alternative date to mark the elimination of the unit. I believe it would be inappropriate to consider whether the unit lost its separate character on some date other than September 31, 2001. In its answer to the compliance specification, the Respondent claimed only the September 31, 2001, date and to consider a newly raised cut-off date, of which the General Counsel and the Charging Party did not have notice at the time of the compliance hearing, would deprive those parties of a reasonable opportunity to respond and would not comport with due process requirements. Moreover, the Board's rules and regulations require that a respondent's answer "specifically state the basis" of any disagreement with the "premises" of the compliance specification and "set[ ] forth in detail the respondent's position as to the applicable premises and furnish[ ] the appropriate figures." Section 102.56(b), Rules and Regulations of the National Labor Relations Board. Allegations not denied in this manner are to be deemed admitted. Section 102.56(c). Considering the Respondent's disagreement based on another cut-off date, over a year later than the date claimed in the answer to the compliance specification and first alleged in the Respondent's post-hearing brief, would deprive the General Counsel and the Charging Party of the procedural guarantees provided by the Board's regulations. Cf. *Weinacker Bros., Inc.*, 166 NLRB 14, 15 (1967) (where General Counsel alleges a new factual basis, post-compliance hearing, that would constitute an amendment of the compliance specification, the matter has not been fully litigated, and consideration of the new facts is denied).

I observe, moreover, that it appears that the Respondent made many of the post-May 2001 operational changes in violation of the existing Board order, which prohibits the Respondent from changing unit employees' terms and conditions of employment without either obtaining the Union's consent or giving it proper notice and an opportunity to bargain. The changes made by the Respondent include modifications of unit employees' shifts, work hours, duties, assignments, and duty stations within the Buena facility – terms and conditions of employment that are generally subject to bargaining.[33] The Union was not given notice or an opportunity to bargain over any of those changes or their effects. The Respondent claims that it is relieved of the obligation to bargain over the changes for a number of reasons, but none of those reasons have any real merit. First, the Respondent contends that the Union, through inaction, waived the right to protest the changes. "[A] union may be found to have waived its rights if, upon being notified of a proposed change in terms and conditions of employment, it 'fails to act diligently in seeking bargaining.'" *Sea Jet Trucking Corp.*, 327 NLRB at 546, quoting *Intermountain Rural Electric Assn.*, 305 NLRB 783 (1991). In this case, however, not only did the Respondent fail to give the Union prior notice of any of the specific changes, but its position

[33] See *Dallas & Mavis*, 346 NLRB No. 27, slip op. at 6 (2006) (bargaining required over transfer of work out of the bargaining unit); *SFX Target Center Arena Management, LLC*, 342 NLRB No. 71, slip op. at 12 (2004) (bargaining required over change in work assignments) *Artesia Ready Mix Concrete, Inc*., 339 NLRB 1224, 1225 (2003) (same); *Sheraton Hotel Waterbury*, 312 NLRB 304, 307 (1993) (bargaining required over change to shifts); *Tuskegee Area Transportation System*, 308 NLRB 251 (1992), affd. 5 F.3d 1499 (11th Cir. 1993), cert. denied 511 U.S. 1083 (1994) (same); *Our Lady, Of Lourdes Health Center*, 306 NLRB 337, 339 (1992) (same); *San Antonio Portland Cement Co.*, 277 NLRB 338 (1985) (bargaining required over transfer of unit employees to new assignment and location at facility); *Plymouth Locomotive Works, Inc.*, 261 NLRB 595, 602 (1982) (bargaining required regarding automation that will result in elimination of unit jobs); *Richland, Inc.*, 180 NLRB 91 (1969) (bargaining required regarding automation of bargaining unit work); *Seven-Up Bottling Co. of Sacramento*, 165 NLRB 607, 608 (1967), enfd. 420 F.2d 495 (9th Cir. 1969) (change that would eliminate unit jobs is a mandatory subject of bargaining); *General Electric Company*, 137 NLRB 1684, 1686 (1962) (bargaining required over change to work hours).

during the relevant time period was that the unit had ceased to exist and that Comar would not bargain over changes.[34] Despite the Respondent's refusal to recognize the Union, representatives of the Union repeatedly requested that the Respondent recognize and bargain with the Union, and otherwise comply with the Board's order. In light of these facts, the Respondent's argument based on waiver is utterly without merit.

Also lacking merit is the Respondent's assertion that the changes are exempted from bargaining under an exception that applies to relocation decisions when the employer shows that "the union could not have offered labor cost concessions that could have changed the employer's decision to relocate." *Dubuque Packing Co.*, 303 NLRB 386, 391 (1991), 1 F.3d 24 (D.C. Cir. 1993). That exemption is inapplicable here because it applies only to relocation decisions,[35] and the post-May 2001 operational changes at-issue were not a relocation. The impact of the relocation itself has already been evaluated by the Board, and the Board ruled that the unit continued to exist after being moved to the Buena facility.[36] The Respondent's

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[34] The Respondent, while it concedes that it refused to recognize the Union during the period it made these changes, contends that the Union had prior notice because a union official was present during the hearing before Judge Kocol, when the Respondent presented testimony about some planned changes. The Respondent did not show that the union official heard testimony about any of the specific changes that are at-issue here, or that whatever the official heard was specific or reliable enough to constitute meaningful notice. The Respondent also claims that notice was somehow provided by way of the motion to reopen the record that it submitted to the Board after Judge Kocol's decision. That motion discusses changes that the Respondent claims it had *already* made and, therefore, at best provided the Union with notice of a *fait accompli*. Waiver cannot be predicated on notice that presents the change as a *fait accompli* or that does not give sufficient advance notice of the change. *Gratiot Community Hospital v. NLRB*, 51 F.3d 1255, 1259-60 (6th Cir. 1995); *Gulf States Mfg v. NLRB*, 704 F.2d 1390, 1397 (5th Cir. 1983); *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017-18 (1982), enfd. 722 F.2d 1120 (3dCir. 1983).

[35] See *Rock-Tenn Co.*, 319 NLRB 1139, 1144 (1995), enfd. 101 F.3d 1441 (D.C. Cir. 1996) (Board states that *Dubuque* "test was devised for determining the nature of relocation decisions, and we did not purport to extend it to other types of management decisions that affect employees."); *Mid-State Ready Mix*, 307 NLRB 809, 810 (1992) (same).

[36] For the same reason, I am unpersuaded by the Respondent's citation to *Kelly Business Furniture*, 288 NLRB 474 (1988), in which a unit was invalidated based on the impact of a relocation. Indeed, the Board already considered the *Kelly* holding in the context of the Vineland unit's relocation, and the Board found that the unit survived that relocation, and, in fact, was still appropriate at the time of the hearing over 18 months removed from the completion of the relocation. The Board declined to follow *Kelly* because, inter alia, the unit in that case did not have the long bargaining history of the Vineland unit, and, unlike in the instant case, none of the changes implemented by the Respondent in the merger process were found to be unlawful. *Comar*, 339 NLRB at 911. Similarly inapposite is the holding of *Frito-Lay*, 177 NLRB 820 (1969), another case in which the unit did not have the lengthy bargaining history of the Vineland unit and the employer was not shown to have implemented any changes unlawfully. *Frito-Lay* is also inapplicable because the invalidation of the unit there was based on a major overhaul of the employer's national management structure, which the Board found completely eliminated the level of organizational control upon which the unit was premised and was "clearly not for the purpose of avoiding compliance with the Board's unit finding." The production improvements that the Respondent relies on here were not nearly as significant, and were not shown to have altered the continuity of supervision that was discussed in the underlying decision. Moreover, the credible evidence in this case does not establish that the operational

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argument also fails because, as Bianco was forced to concede, a desire to reduce labor costs was a major factor in the operational decisions and decisions based on labor costs are "'peculiarly suitable for resolution within the collective bargaining framework.'" *Holly Farms Corp.*, 311 NLRB at 278, quoting *First National Maintenance v. NLRB*, 452 U.S. 666, 680 (1981). Moreover, as discussed above, Bianco's self-serving and conclusory testimony that the operational changes could not have been altered by bargaining is not credible and is insufficient to establish that the changes were not a mandatory subject of bargaining. See *Geiger Ready-Mix Co.*, 315 NLRB 1021, 1032 (1994) ("employer must offer something more than a self-serving assertion that there was nothing the bargaining agent of its unionized employees could do to change its mind") and *Pertec Computer*, 284 NLRB 810, 811 fn.3 (1987), decision supplemented 298 NLRB 609 (1990), enfd. in relevant part 926 F.2d 181 (2d Cir. 1991), cert. denied 502 U.S. 856 (1991) ("[T]o conclude in advance of bargaining that no agreement is possible is the antithesis of the Act's objective of channeling differences, however, profound, into a process that promises at least the hope of mutual agreement.").

Equally without merit is the Respondent's related claim that the operational changes were exempt from bargaining under *First National Maintenance Corp. v. NLRB*, supra, which affords special treatment to managerial decisions that significantly alter the scope and direction of a business. The changes that the Respondent made after May 2001 do not begin to approach that level. They were incremental improvements to the Respondent's production process and, as the Respondent admits, did not alter the nature of its business – the manufacture of packaging products and medical device components for pharmaceutical, health care, and personal care customers.[37]

I also reject the Respondent's claim, raised for the first time in its posthearing brief, that the post-May 2001 operational changes were exempted from bargaining under a management rights clause in the expired collective bargaining agreement. I doubt that this contention has been fully litigated, but, in any case, the Board has held that the effect of such a provision, unlike other terms in a contract, does not survive the expiration of that contract absent evidence of the parties' contrary intentions. *Long Island Head Start Child Development Services*, 345 NLRB No. 74, slip op. at 1 (2005), *Blue Circle Cement Co.*, 319 NLRB 954, 954 (1995).[38] Therefore, it appears that the provision relied upon by the Respondent cannot authorize the post-expiration changes at issue here.

Even if I were to consider the current state of the unit, including all of the changes – whether lawful or unlawful – that the Respondent has made to the former Vineland employees' working conditions from the time of the relocation until the compliance hearing, I would not

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changes by which the Respondent claims to have eliminated the unit were "clearly not for the purpose of avoiding compliance with the Board's unit finding." See, supra, footnote 15.

[37] That is the way the Respondent's business was described in the underlying decision, and the Respondent has admitted that the description is still valid. See *Comar*, 339 NLRB at 905; GC Exh. 1(s), Complaint Para. 2(a); GC Exh. 1(w), Answer Para. 2(a).

[38] It does not appear that the contract provision that extends the agreement's expiration date during bargaining for a new contract is applicable here, since there have been no such negotiations. In addition, the management rights clause provides that it shall not be exercised "in derogation of terms and conditions of [the collective bargaining] agreement." I note, however, that the Respondent did not raise the management rights clause issue until after the hearing, and the parties did not present significant evidence regarding the proper interpretation of either the provision providing for extensions of the contract's expiration date or the management rights clause.

invalidate the unit. Most current employees who formerly worked at Vineland as part of the bargaining unit continue to produce the same types of products, for the same types of customers, using many of the same types of machines and processes that they did at the Vineland facility. The sort of ongoing, incremental, improvements that the Respondent has made to production at the Buena facility are commonplace in the manufacturing industry and generally do not justify withdrawal of recognition from a Union that represents a longstanding, established, unit. See, e.g., *Leach Corporation*, 312 NLRB 990, 995 (1993), enfd. 54 F.3d 802 (D.C. Cir. 1995); *Allied Mills, Inc.*, 218 NLRB 281, 285 (1975), enfd. 543 F.2d 417 (D.C. Cir. 1976) (Table), cert. denied 431 U.S. 937 (1977); *Columbia Tribune Publishing Co.*, 201 NLRB 538, 550 (1973), enfd. in relevant part 495 F.2d 1384 (8th Cir. 1974). As found in the underlying unfair labor practices decision, the unit has a "deeply absorbed" bargaining history of well over 40 years. *Comar*, 339 NLRB at 910. Where there is such a lengthy history of collective bargaining for a unit, the Board has required continued recognition even when operational changes result in the unit employees doing the same type of work on the same equipment as non-unit employees within a broader facility or group. *Radio Station KOMO-AM*, 324 NLRB 256, 262-63 (1997); *Serramonte Oldsmobile*, 318 NLRB 80, 104 (1995), enfd. in relevant part 86 F.3d 227 (D.C. Cir. 1996); *Children's Hospital*, 312 NLRB 921, 928-30 (1993), enfd. sub nom. *California Pacific Medical Center v. NLRB*, 87 F.3d 304 (9th Cir. 1996). Absent "compelling circumstances" the history of meaningful bargaining in this case is sufficient to establish the continued appropriateness of a separate unit, even if other factors support a contrary result. See *KOMO-AM*, 324 NLRB at 262. Such "compelling circumstances" are not evident here, and are certainly not established by the assorted incremental improvements that the Respondent made to its manufacturing process over a period of approximately 5 years.

For the reasons discussed above, I reject the Respondent's argument that the remedy should be limited because the unit has ceased to exist.

B. Respondent's August 29, 2003, Letters Were Insufficient to Toll the Backpay Period

The Respondent contends that backpay liability is tolled for the discharged employees (Class B) as of August 29, 2003, when the company sent those employees letters offering them employment at the Buena facility "at the same compensation" they were earning when they were "laid of[f] in 1999." The letters stated that the offers were "made unconditionally," and that the employees had until the following September 15 to respond. In order to toll backpay liability, an employer's offer "must be specific, unequivocal, and unconditional in offering a discriminatee his or her previous position, at the same rate of pay, with seniority and benefits intact." *Midwestern Personnel Services*, 346 NLRB No. 58, slip op. at 1-2 and 10 (2006). An employer does not meet that standard if it fails to offer the individual the same shift and starting time. Id. at 2; *Pinnacle Metal Products Co.*, 337 NLRB 806, 816 (2002). The offer must "clearly remove" any previously stated unlawful conditions that the Respondent placed on employment. *Tony Roma*, 325 NLRB 851, 852 (1998). The employer is required to offer the individual the "same position," unless it shows that such position is not available, in which case the offer of a substantially equivalent position will toll backpay, assuming the other requirements are met. *Murbo Parking, Inc.*, 276 NLRB 52 (1985)

As discussed above, the Board found that the Respondent effectively discharged the Class B employees when it offered them transfers to the Buena facility, but unlawfully changed the wages and benefits that had resulted from the collective-bargaining process. In the August 29 letters, the Respondent again offered those employees employment at the Buena facility, but did not clearly lift the unlawful conditions, as required by Board precedent. See *Tony Roma*, supra. The letters state that returning employees will receive the same compensation as before

the relocation, but makes no mention of restoring the employees' bargained-for seniority system, job tenure protections and preferences, and distinct retirement system. To the contrary, upon transferring to the Buena facility, unit employees were required to sign agreements stating that they were at-will employees, a significant change from their pre-discharge status. In addition, the Respondent has made changes to unit employees' shifts and work hours, but the August 29 letters made no mention of offering returning employees the same shifts and working hours that they had prior to being unlawfully discharged. Nor did the Respondent's offer state that returning Class B employees would receive the bargained-for holiday, sick day, bereavement and other leave benefits that the Respondent had refused them at the time they were unlawfully discharged.

For these reasons, I conclude that the August 29 letters did not constitute valid offers of reinstatement and do not limit the remedy.[39]

C. Respondent Has Failed to Show that Unlawfully Discharged Employees Would Have Been Laid Off for Lawful Reasons at a Later Date

The Respondent asserts, as an affirmative defense, that: "Class B Employees are not entitled to reinstatement because . . . downsizing at the Buena, New Jersey facility, due to legitimate business reasons, caused their positions to be eliminated and open positions are not available." Under Board law, a respondent may limit its backpay liability and duty to reinstate unlawfully terminated employees by showing that the employees would have been laid off for lawful reasons at a later date. *Weldun International Inc.*, 340 NLRB 666, 674 (2003); *So-White Freight Lines*, 301 NLRB 223 (1991), enfd. 969 F.2d 401 (7th Cir. 1992). However, "'the burden [is] on [the respondent] to prove with certainty when the discriminatees would have been laid off, absent discrimination.'" Id., quoting *Fruin-Colnon Corp.*, 244 NLRB 510, 512 (1979); see also *Daniel Construction Co.*, 276 NLRB 1093, 1097 (1985); *Masco Products, Inc.*, 198 NLRB 424 (1972). A respondent cannot succeed in closing the backpay period based on mere speculation that the discriminatee would have subsequently been laid off for legitimate reasons. *Weldun*, supra; *F&W Oldsmobile*, 272 NLRB 1150, 1151 (1984).

The record shows that from 2001 forward, there has been a steady decline in the number of employees at the Buena facility. In 2001, there were 203 hourly employees at the facility and 90 in the finishing department, and by 2005 there were 164 hourly employees at the facility and 65 in the finishing department. However, the Respondent failed to show that this rather gradual contraction in its workforce would have led to involuntarily lay-offs for any of the Class B employees. To the contrary, the record shows that during the period covered by the compliance specification, the Respondent did not lay off any of the unit employees who accepted transfers to the Buena facility. In fact, the Respondent did not introduce evidence showing that lack of work resulted in any forced layoffs at all at the Buena facility. Nor did the Respondent show that it had refrained from hiring new hourly employees for the Buena facility after 2001. Indeed, as late as August 29, 2003, the Respondent sent letters to all of the discharged unit employees offering them employment at the Buena location. Thus it appears

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[39] In light of these conclusions, I do not address the further contentions of the General Counsel and the Charging Party that the offers were invalid because: the Respondent did not show that the Class B Employees' former positions were unavailable at the time of the August 29 letters; the letter did not describe the positions being offered with adequate specificity; and, the letters improperly set forth a deadline after which the offers would lapse if the recipients did not respond.

likely that the contraction in the Buena facility workforce was accomplished through turnover and attrition, not layoffs or terminations. Given this record, I conclude that the Respondent has failed to show that if the Class B employees had not been unlawfully discharged in 1999, there would have been a lawful layoff at some later date. Even assuming that a layoff of some sort would have been necessary, the Respondent has not shown when that layoff would have occurred, how many employees it would have affected, or that any of the unlawfully discharged employees would have been among those selected. On this record, the Respondent has clearly failed to meet its burden of proving "with certainty" the dates when particular Class B employees would have been lawfully laid off.

For the reasons discussed above, I reject the Respondent's contention that the remedy for the unlawfully discharged employees is limited because those employees would have been terminated for lawful reasons at a later date.

D. Respondent Has Not Shown that Transmarine Calculations Are Inconsistent with Board's Order or Prior Precedent

The Respondent makes a number of arguments for limiting the *Transmarine* remedy to the 2-week period that the Board's order sets forth as a minimum, rather than accruing that remedy on a continuing basis as the compliance specification does. First, the Respondent contends that the ongoing *Transmarine* remedy is impermissible because it is punitive, rather than remedial, inasmuch as it overlaps the make-whole backpay remedy also provided by the order. The Respondent identifies no Board decisions that support this contention. At any rate, the logic of the Respondent's argument is faulty because regardless of whether the *Transmarine* remedy accrues for just 2 weeks, or for an open-ended period, it will overlap with the make-whole backpay remedy for that period of time. Thus the 2-week *Transmarine* remedy that the Respondent advocates is subject to the same criticism that the Respondent lodges against the ongoing *Transmarine* remedy. The Board has already considered the overlapping recovery issue in its underlying decision and ordered that the *Transmarine* remedy be provided even to those employees who were receiving make-whole relief – reversing Judge Kocol's ruling that the *Transmarine* remedy would provide an inappropriate windfall for such employees. The Board's order was enforced by the Court of Appeals without modification in this regard. Thus, the Respondent's argument that an ongoing *Transmarine* remedy is impermissible because it provides overlapping recovery is precluded by the Board's decision authorizing overlapping recovery.

I conclude, moreover, that, given the purposes of the *Transmarine* remedy, it is more appropriate in this instance to continue such relief during the backpay period than to limit it to the 2-week minimum. First, I note that the *Transmarine* remedy and the make-whole remedy compensate the employees for different losses. The make-whole relief is a remedy for the Respondent's failure to provide victims with the compensation that resulted from the collective bargaining process. The *Transmarine* remedy, on the other hand, compensates victims for the Respondent's failure to engage in effects bargaining over the relocation -- a type of violation that causes harm to employees that is not addressed by the make-whole backpay remedy. As the Board has recognized, when an employer unlawfully fails to engage in effects bargaining it is proper to take into account potential losses resulting from the fact that "the Union might have secured additional benefits for employees had the Respondent engaged in timely effects bargaining." *Live Oak Skilled Care & Manor*, 300 NLRB 1040 (1990). "[T]he [u]nion can hardly hope to obtain the same benefits from bargaining that might have helped ease the unit employees' transition into their employment with their new employer or new employment had 'effects' bargaining taken place at the time required by law." *Signal Communications*, 284 NLRB

423, 428 (1987). Moreover, if the Respondent had met its obligation to pay the unit workers their higher, bargained-for, wages at the time of the relocation, then the percentage raises granted since that time would have resulted in the unit employees receiving wages even higher than the pre-relocation benchmark. Such losses are not remedied by the make-whole backpay remedy in this case, which is calculated based on the difference between the pre-relocation benchmark and what the Respondent paid employees after the relocation. The Board has found that the *Transmarine* remedy is appropriately employed to address such losses, even if the employees are already receiving what they were paid prior to the employer's failure to bargain. See *Live Oak*, 300 NLRB at 1040 and 1042. Such losses are uncertain, but "it is reasonable to require that 'the employees whose statutory rights were invaded by reason of the Respondent's unlawful . . . action, and who may have suffered losses in consequence thereof, be reimbursed for such losses until such time as the Respondent remedies its violation by doing what it should have done in the first place.'" *Live Oak*, 300 NLRB at 1042, quoting *Royal Plating & Polishing Co.*, 160 NLRB 990, 999 (1966); see also *Gannett Co., Inc.*, 333 NLRB 355, 359 (2001).

More importantly, the Board's purpose in creating the *Transmarine* remedy is not merely to reimburse employees for losses, but as the Board explained in *Sawyer of Napa, Inc.*:

> [T]o create in some practicable manner a situation in which the parties' bargaining is not entirely devoid of consequences for the respondent. It provides that if there are delays in the bargaining process, backpay increases until one of the stated conditions is met, thereby, insuring that the consequences to the respondent are progressively greater and that there is a corresponding enhancement of the union's bargaining strength.

321 NLRB 1120 (1996); see also *First National Maintenance Corp. v. NLRB*, 452 U.S. at 681-82 ("[U]nder Section 8(a)(5), bargaining over the effects of a decision must be conducted in a meaningful manner and at a meaningful time, and the Board may impose sanctions to insure its adequacy."). In this case, I conclude that limiting the *Transmarine* remedy to the 2-week minimum would be inconsistent with that purpose. I note, first, the Respondent's recalcitrance. The Board issued its order over two and half years ago, and the Court of Appeals affirmed the Board's order nearly two years ago. Yet at the time of the compliance hearing the Respondent had still failed to meet the obligations under that order to bargain over the effects of the relocation[40] and for a new collective bargaining agreement, and had never rescinded the unilateral changes that the Board has already found to be violations. Indeed, the Respondent has the audacity to claim in this compliance proceeding that the lengthy delay occasioned by its continued resistance to its statutory obligations has rendered the Board's enforced bargaining order stale and unenforceable,[41] and seeks to rely on the company's unlawful and unremedied changes to employees' conditions of employment to argue that the bargaining unit the Board validated in the underlying decision must now be invalidated.[42]

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[40] The Respondent's failure to bargain in good faith over the effects of the relocation is discussed infra.

[41] In its answer to the compliance specification, the Respondent states, as an affirmative defense, that "the passage of time and the significant changes that have occurred, including, but not limited to the automation of the Respondent's finishing operations," have rendered the underlying decision "stale" and the "bargaining order moot."

[42] If permitted to succeed, such a tactic would provide a template for any employer that wished to unlawfully withdraw recognition from a union. Simply withdraw recognition, begin making unlawful unilateral changes that diminish the distinctive nature of the unit, delay compliance with unfavorable decisions, and then argue that the passage of time and the

Continued

Moreover, as found above, the Respondent has committed further violations of the Act by withholding information from the Union that is necessary for effects bargaining. It is clear that consequences of the type described in *Sawyer of Napa*, supra, are necessary in this case to convince the Respondent to take its obligations under the Act and the Board's enforced order seriously. That end will not be met by a fixed 2-week *Transmarine* remedy, which would not impose progressively greater consequences on the Respondent for continued refusal to bargain in good faith. Nor, do I believe that adequate progressive consequences are imposed by the make-whole element of the remedy since wage increases granted outside of the bargaining process during the 5-year period covered by the compliance specification have largely eliminated the differences between the bargained-for compensation and the initially lower compensation paid to unit employees who transferred to the Buena facility. Thus further non-compliance by the Respondent will generate smaller and smaller amounts of additional make-whole relief, and progressively less incentive for the Respondent to fulfill its obligations under the Act and the Board's order. Once the employees who refused transfer under the unlawful conditions are reinstated, as required by the Board's order, the same will be true for any make-whole relief previously being generated for them. For these reasons, I believe that an ongoing *Transmarine* remedy is necessary to provide the Union with the leverage anticipated in *Sawyer of Napa.*

The Respondent also argues that the calculations in the compliance specification improperly fail to deduct the amount of the employees' interim earnings from the *Transmarine* relief. The Respondent cites a number of cases in which interim earnings were deducted from the amount of the *Transmarine* remedy, but in other cases the Board has declined to do so. Compare *Sawyer of Napa, Inc.*, 321 NLRB at 1121 fn.3 (severance pay deducted) and *W.R. Grace & Co.*, 247 NLRB 698, 699 fn.5 (1980) (severance pay deducted) with *Dallas Times Herald*, 315 NLRB 700, 702 (1994) (employer's payments to terminated employees under the Worker Adjustment and Retraining Notification Act are not deducted) and *Live Oak Skilled Care & Manor*, 300 NLRB at 1040 (employees awarded *Transmarine* remedy equal to their normal rates of pay, for period when they are already receiving normal rates of pay from the employer). In this case, the Board has, in my view, already decided that interim earnings should not be deducted from the *Transmarine* remedy. In his recommended order in the underlying proceeding, Judge Kocol explicitly provided that the *Transmarine* remedy would be reduced by the amount of any interim earnings, but the Board modified that order by striking the language regarding the interim earnings deduction. It would be presumptuous of me to simply assume, without any basis in the Board's order, that the Board's modification of Judge Kocol's order was unintentional or otherwise of no significance. I am particularly circumspect about discounting that change given that the Board also overruled Judge Kocol's conclusion that a blanket *Transmarine* remedy should be denied because it would constitute overlapping recovery for employees who had already been made whole.

The Respondent also argues that the *Transmarine* remedy calculated in the compliance specification is improper because employees have secured "equivalent employment," and the amount of the remedy therefore exceeds "the amount that [each employee] would have earned as wages from the date of the relocation of the unit employees to the time he or she secured equivalent employment." Respondent's Brief at 41-42, quoting *Comar*, 339 NLRB at 903. The Respondent does not reveal which of the unit employees it believes obtained "equivalent employment" or when it believes they did. Nor does the Respondent cite any authority

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unilateral changes have destroyed the unit and rendered the Board's bargaining order unenforceable. If the Board rejects that argument, argue that the further passage of time and subsequent changes have eliminated the unit and continue to refuse to recognize the union.

indicating that the standard for what constitutes equivalent employment in this context is any lower than the standard applied in evaluating the validity of reinstatement offers. As discussed previously, the employment that the Respondent has made available to unit members at the Buena facility is not equivalent to their employment at the Vineland facility because it does not provide the same job tenure protections and preferences, seniority system, retirement system, leave benefits, shifts, and working hours.

For these reasons, I conclude that the Respondent has failed to show that any of the unit employees have secured equivalent employment, or that the *Transmarine* remedy should be limited on that basis.

Lastly, the Respondent contends that the *Transmarine* remedy should be tolled because it attempted to engage in effects bargaining, but was thwarted by the Union. Under the Board's order, the *Transmarine* remedy will be tolled if the Union either fails to "commence negotiations within 5 business days after receipt of the Respondent's notice of its desire to bargain with the Union" on those subjects pertaining to the effects of the relocation, or fails "to bargain in good faith." I find that the Respondent has not shown that the Union failed to timely attempt effects bargaining, or to pursue such bargaining in good faith. The record shows that the Union requested bargaining shortly after Judge Kocol's decision, again shortly after the Board's decision, and again after the Court of Appeals enforced the Board's order. The Respondent does not claim that it agreed to engage in effects bargaining in response to either of the first two of those requests by the Union. In response to the Union's August 18, 2004, request following the Court of Appeals' decision, the Respondent indicated that it was willing to bargain over effects as required by the Act and the Board order. It took the parties almost 5 months of haggling over bargaining dates before they actually met, but this delay was more the result of the Respondent's actions than of the Union's, and certainly does not establish bad faith on the Union's part. The record shows that when the Respondent received the August 18 letter from the Union requesting bargaining, the Respondent did not respond directly to the Union, but, rather, sent a letter to the Board stating its own willingness to bargain over effects, "if" the Union requested it. On two occasions thereafter, the Union proposed bargaining dates, but in both instances the Respondent rejected those dates. When the Respondent proposed 3 dates of its own, the Union answered that it was willing to meet on any of those dates. The Respondent, however, did not confirm any of those dates, and when the Union contacted the Respondent again to arrange to meet on either of the two remaining dates, the Respondent refused to meet on the very dates that the Respondent itself had previously proposed. Counsel for the Respondent stated that he would contact the Union with additional dates when he returned from vacation, but he did not re-contact the Union for over a month. Under these circumstances, any effort to lay the blame for the delay at the Union's doorstep must be rejected.

As discussed above, when the parties finally met, on January 18, 2005, the Respondent unlawfully refused to provide information that was necessary to bargaining over the effects of the relocation, and provided other necessary information only after an excessive delay. It failed, moreover, to rescind the unlawful changes in unit employees' terms and conditions of employment, as required by the Board's enforced order. In the underlying decision, the Board held that, under precisely such circumstances, "good-faith bargaining over the effects of the relocation was precluded by Respondent's unlawful conduct." *Comar*, 339 NLRB at 913. Good-faith effects bargaining was still precluded on January 18, 2005 and at the time of the hearing, because the relevant circumstances included the same unlawful conduct by the Respondent.

I conclude that the Respondent has failed to establish that it was willing to bargain over the effects of the relocation, but that the Union failed to bargain in good faith, or that the *Transmarine* remedy should be tolled.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5).

3. The Respondent violated Section 8(a)(5) and (1) of the Act by: unreasonably delaying the provision of information regarding unit employees that the Union requested in its September 1, 2004, letter; unreasonably delaying the provision of information regarding non-unit employees that the Union verbally requested on January 18, 2005; and, refusing to supply other information regarding non-unit employees that the Union verbally requested on January 18, 2005.

4. The Respondent has not established any basis for reducing or altering the relief set forth in the compliance specification.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.[43]

ORDER

The Respondent, Comar, Inc., of Buena, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and/or refusing to provide the Union with requested information that is relevant and necessary for the Union to fulfill its role as the collective bargaining representative of the unit employees.

(b) Unreasonably delaying the provision of information requested by the Union that is relevant and necessary for the Union to fulfill its role as collective bargaining representative of the unit employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole the individuals named below for the backpay period up through December 31, 2004, by paying them the amounts following their names, plus interest accrued from September 27, 1999, to the date of payment, as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings required by Federal and State Law:

Name	Amount Owed	Name	Amounted Owed

[43] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Kristine Armstrong	$9,300.55	James Massey	$4,102.80
Ruth Benowitz	$14,119.96	Doris McGaha	$9,403.30
Barbara Bryant	$18,275.44	Michael Munson	$6,398.40
Linda Caudill	$4,942.81	Theresa Morgan	$17,740.73
Mary Cione	$13,029.46	Rita Ojeda	$16,010.49
Lea Clark	$9,245.65	Arlene Pollock	$15,203.83
Margaret Creelman	$13,375.42	Joe Ann Saul	$15,080.39
Sarah Hannah	$6, 681.54	Florence Simione	$6,056.73
Beatrice Ingegneri	$12,497.45	Debra Stamm	$13,616.38
Norma Loatman	$21,341.66	Lenell Stewart	$7,172.16
Carole Loguidice	$15,666.06	Joy West (Ballurio)	$14,035.04

(b) Make whole the individuals named below for the backpay period up through December 31, 2004, by paying them the amounts following their names, plus interest accrued from September 27, 1999, to the date of payment, as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings required by Federal and State Law:

Name	Amount Owed	Name	Amounted Owed
Theresa Capaldi	$5,867.04	Gail Paulaitis	$41,095.80
Judith Carney	$57,568.32	Ella Percev	$697.86
Shelley Carney	$30,812.51	Linda Pierce	$39,674.88
Nancy Fairman	$104,850.64	Helena Pollock	$37,935.45
Vessi Gargoff	$62,429.37	Ingrid Regalbuto	$35,338.98
John Gray	$10,419.65	Rhonda Rio	$84,538.96
Catherine Guilford	$196,744.89	Sandra Thurston	$8,013.12
Michele Guilford	$124,265.04	June Walko	$128,799.02
Sheila Heck	$88,985.83	Alice Weddington	$7,467.82
Robert Joslin	$2,023.62	Anthony Weissner	$57,230.45
Latanya Mack	$28,661.72		

(c) Compensate the individuals named below for the Respondent's effects bargaining violation, pursuant to *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), in the amounts set forth for the period up through December 31, 2004:

Name	Amount Owed	Name	Amounted Owed
Kristine Armstrong	$33,906.24	James Massey	$38,942.40
Ruth Benowitz	$33,584.16	Doris McGaha	$33,584.16
Barbara Bryant	$33,584.16	Theresa Morgan	$33,584.16
Theresa Capaldi	$917.60	Michael Munson	$48,136.32
Judith Carney	$33,584.16	Rita Ojeda	$33,437.76
Shelley Carney	$33,584.16	Gail Paulaitis	$917.60
Linda Caudill	$33,613.44	Ella Percev	$905.60
Mary Cione	$24,722.88	Linda Pierce	$33,584.16
Lea Clark	$33,584.16	Arlene Pollock	$33,232.80
Margaret Creelman	$33,906.24	Helena Pollock	$33,642.72
Nancy Fairman	$33,642.72	Ingrid Regalbuto	$33,584.16
Vessi Gargoff	$33,584.16	Rhonda Rio	$33,642.72
John Gray	$1,069.60	Joe Anne Saul	$33,906.24

Catherine Guilford	$33,584.16	Florence Simione	$33,906.24
Michele Guilford	$917.60	Debra Stamm	$34,374.72
Sarah Hannah	$34,608.96	Lenell Stewart	$6,399.84
Sheila Heck	$33,584.16	Sandra Thurston	$917.60
Beatrice Ingegneri	$33,144.96	June Walko	$35,327.60
Robert Joslin	$34,608.96	Alice Weddington	$917.60
Norma Loatman	$33,437.76	Joy West (Ballurio)	$35,327.60
Carole Loguidice	$33,144.96	Anthony Wiessner	$36,775.20
Latanya Mack	$33,584.16		

(d) Provide the Union with the information that it requested, but which was unlawfully withheld, including, but not limited to, the names of all hourly paid non-unit employees at the Buena, New Jersey, facility, and the complete terms and conditions of employment for these employees.

(e) Within 14 days after service by the Region, post at its Buena, New Jersey, facility copies of the attached notice marked "Appendix."[44] Copies of the notice, on forms provided by the Regional Director for Region Four, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to [employees] [members] [employees and members] are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 1, 2004.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., March 31, 2006.

PAUL BOGAS
Administrative Law Judge

[44] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

JD-24-06
Buena, NJ

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT fail or refuse to provide the Union with requested information that is relevant and necessary for the Union to fulfill its role as the collective bargaining representative of the unit employees.

WE WILL NOT unreasonably delay the provision of information requested by the Union that is relevant and necessary for the Union to fulfill its role as collective bargaining representative of the unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed Section 7 of the .

WE WILL make whole the individuals named below for the backpay period up through December 31, 2004, by paying them the amounts following their names, plus interest accrued from September 27, 1999, to the date of payment, as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings required by Federal and State Law:

Name	Amount Owed	Name	Amounted Owed
Kristine Armstrong	$9,300.55	James Massey	$4,102.80
Ruth Benowitz	$14,119.96	Doris McGaha	$9,403.30
Barbara Bryant	$18,275.44	Michael Munson	$6,398.40
Linda Caudill	$4,942.81	Theresa Morgan	$17,740.73
Mary Cione	$13,029.46	Rita Ojeda	$16,010.49
Lea Clark	$9,245.65	Arlene Pollock	$15,203.83
Margaret Creelman	$13,375.42	Joe Ann Saul	$15,080.39
Sarah Hannah	$6, 681.54	Florence Simione	$6,056.73
Beatrice Ingegneri	$12,497.45	Debra Stamm	$13,616.38
Norma Loatman	$21,341.66	Lenell Stewart	$7,172.16
Carole Loguidice	$15,666.06	Joy West (Ballurio)	$14,035.04

WE WILL make whole the individuals named below for the backpay period up through December 31, 2004, by paying them the amounts following their names, plus interest accrued from September 27, 1999, to the date of payment, as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings required by Federal and State Law:

Name	Amount Owed	Name	Amounted Owed
Theresa Capaldi	$5,867.04	Gail Paulaitis	$41,095.80
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Nancy Fairman	$104,850.64	Helena Pollock	$37,935.45
Vessi Gargoff	$62,429.37	Ingrid Regalbuto	$35,338.98
John Gray	$10,419.65	Rhonda Rio	$84,538.96
Catherine Guilford	$196,744.89	Sandra Thurston	$8,013.12
Michele Guilford	$124,265.04	June Walko	$128,799.02
Sheila Heck	$88,985.83	Alice Weddington	$7,467.82
Robert Joslin	$2,023.62	Anthony Weissner	$57,230.45
Lantanya Mack	$28,661.72		

WE WILL compensate the individuals named below for our unlawful failure to engage in good faith bargaining over the effects of the relocation from the Vineland, New Jersey facility, to the Buena, New Jersey facility, as ordered by the Board pursuant to *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), in the amounts set forth for the period up through December 31, 2004:

Name	Amount Owed	Name	Amounted Owed
Kristine Armstrong	$33,906.24	James Massey	$38,942.40
Ruth Benowitz	$33,584.16	Doris McGaha	$33,584.16
Barbara Bryant	$33,584.16	Theresa Morgan	$33,584.16
Theresa Capaldi	$917.60	Michael Munson	$48,136.32
Judith Carney	$33,584.16	Rita Ojeda	$33,437.76
Shelley Carney	$33,584.16	Gail Paulaitis	$917.60
Linda Caudill	$33,613.44	Ella Percev	$905.60
Mary Cione	$24,722.88	Linda Pierce	$33,584.16
Lea Clark	$33,584.16	Arlene Pollock	$33,232.80
Margaret Creelman	$33,906.24	Helena Pollock	$33,642.72
Nancy Fairman	$33,642.72	Ingrid Regalbuto	$33,584.16
Vessi Gargoff	$33,584.16	Rhonda Rio	$33,642.72
John Gray	$1,069.60	Joe Anne Saul	$33,906.24
Catherine Guilford	$33,584.16	Florence Simione	$33,906.24
Michele Guilford	$917.60	Debra Stamm	$34,374.72
Sarah Hannah	$34,608.96	Lenell Stewart	$6,399.84
Sheila Heck	$33,584.16	Sandra Thurston	$917.60
Beatrice Ingegneri	$33,144.96	June Walko	$35,327.60
Robert Joslin	$34,608.96	Alice Weddington	$917.60
Norma Loatman	$33,437.76	Joy West (Ballurio)	$35,327.60
Carole Loguidice	$33,144.96	Anthony Wiessner	$36,775.20
Latanya Mack	$33,584.16		

WE WILL provide the Union with the information that it requested, but which we unlawfully withheld, including, but not limited to, the names of all hourly paid non-unit employees listed at our Buena, New Jersey, facility, and the complete terms and conditions of employment for these employees.

COMAR, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

615 Chestnut Street, One Independence Mall, 7th Floor

Philadelphia, Pennsylvania 19106-4404

Hours: 8:30 a.m. to 5 p.m.

215-597-7601.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 215-597-7643.